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IN THE

SUPREME COURT OF THE UNITED STATES

No. 991

OCTOBER TERM, 1970

STAPHAN I. KOSERKOFF,
Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY CO.,
Respondent.

SEAMAN'S APPEAL, RULE 54, 28 U.S.C. 1916

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 1970

STAPHAN L. KOSERKOFF,
Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY CO.,
Respondent.

SHAMAN'S APPEAL, RULE 34, 28 U.S.C. 1916

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, made and entered June 5, 1970, rehearing denied, September 10, 1970.

OPINIONS BELOW

The case was tried in the United States District Court for the Eastern District of Michigan, Southern Division, before a jury. The jury returned a verdict for the Plaintiff, Petitioner herein, STAPHAN L. KOSERKOFF, against the Defendant, Respondent herein, CHESAPEAKE & OHIO RAILWAY COMPANY; District Judge Thomas P. Thornton entered a judgment thereon, and denied post-trial motions filed by the Defendant. The proceedings in the District Court are not reported, and are made a part of the Appendix hereto.

An appeal was perfected by the Chesapeake & Ohio Railway Company to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals reversed the judgment and the jury verdict and remanded the cause to the District Court for dismissal. Rehearing was denied. The opinion of the Court of Appeals is reported at 427 F.2d 1049.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Sixth Circuit was made and entered June 5, 1970, rehearing denied September 10, 1970. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Where a shoreside crane hopper is used to unload cargo from a vessel, does the Admiralty Extension Act, 46 U.S.C. 740, apply to a debarking seaman's personal injuries suffered on the dock, but commenced on and caused by the crane?

2. Does a stevedore contractor warrant he will not render the vessel unseaworthy directly to the crew of the vessel?

3. Does the Court of Appeals' appellate jurisdiction extend to reweighing evidence and making new findings and inferences of fact in reviewing a judgment entered on a jury verdict in a case for personal injury caused by negligence, or is appellate jurisdiction limited to determination of the sufficiency of the evidence to sustain the jury verdict?

STATUTES INVOLVED

The Jones Act, 46 U.S.C. 688; the Admiralty Extension Act, 46 U.S.C. 740; Rule 15 (b) (c), Federal Rules of Civil Procedure, 28 U.S.C. The statutes are set forth in the Appendix.

STATEMENT OF THE CASE

This was a case for personal injury filed by the Petitioner STAPHAN L. KOSERKOFF, against his employer American Steamship Company and a third-party defendant, CHESAPEAKE & OHIO RAILWAY COMPANY.

The action against the employer under the Jones Act, 46 U.S.C. 688, and the general maritime law was compromised by the payment of $7,500.00, plus $1,928.00, as maintenance and cure.

Plaintiff asserted against the Defendant, CHESAPEAKE & OHIO RAILWAY COMPANY, a cause of action under the maritime law for its negligent interference with his debarkation and safe egress from the vessel on October 3, 1962. The case was tried under the common law for negligence, over Plaintiff's objection.

The cause went to trial before a jury and a verdict against the Defendant in the sum of $22,500.00 was rendered on March 14, 1969, and a judgment entered thereon on March 28, 1969.

Post-trial motions were denied and appeal was taken by CHESAPEAKE & OHIO RAILWAY COMPANY on August 1, 1969. Plaintiff cross-appealed on the form of judgment claiming interest should accrue from the date suit was filed.

STATEMENT OF FACTS

As applies to the parties to this Petition, the Petitioner-Plaintiff, Staphan L. Koserkoff, and the Respondent-Defendant, Chesapeake & Ohio Railway Company, the facts are simply summarized as follows:

The vessel S.S. "J. F. Schoelkopf, Jr.", upon which the Plaintiff was employed as a seaman by its owner, American Steamship Company, docked at the Defendant's dock in Toledo, Ohio, to discharge a cargo of bulk ore. Defendant was the stevedore unloading the cargo.

The defendant has railroad tracks running on the dock along which its crane moves in discharging cargo from the vessels.

After the berthing was completed, the crew, including the Plaintiff, were granted shore leave. The Plaintiff's daughter, Mrs. Nancy Waxler, was in her car at the dock waiting to pick him up.

After the vessel was tied up, the ship's crew secured an aluminum boarding ladder from the deck down to the dock, the usual method for the crew to board and debark from the vessel. In negotiating the ladder, a man faces the vessel with his back to the shore.

Three of the crew descended the ladder, down to the dock and left. The Plaintiff was following two more men down the ladder when the defendant's crane moved on the tracks up against the ladder blocking their descent to the bottom of the ladder, and the dock. The two crewmen ahead of Koserkoff stepped off the ladder onto the crane and jumped six or eight feet to the dock and left.

The Plaintiff followed them onto the crane, and as he momentarily looked down to assess his position, he heard someone yell at him to get off the crane; startled, he jumped to the dock suffering the injuries for which the jury awarded him a verdict of $22,500.00.

STAPHAN L. KOSERKOFF, *Direct*, Page 53a[1]

"Q. Silly question, I'm sorry I asked it. Did you go all the way down the ladder?

"A. Yes sir. As far as the—as far as I can reach.

"Q. How far did you go down?

"A. Oh, maybe around eight steps.

"Q. How far was that—halfway, three quarters?

"A. Well, I imagine around three-quarter, the step.

"Q. Why didn't you go all the way down?

"A. Well, before I—I had another couple guys back up there.

"Q. Wait a minute, you are going too fast again. What happened?

"A. Before I make up to the bottom, their company pull out the crane against the stepladder."

STAPHAN L. KOSERKOFF, Page 73a

"Q. Now, do you know, Mr. Koserkoff, who told you to jump off the crane?

---

1. Appendix on appeal from record in Circuit Court is referred to as "53a."

"A. I don't know. I heard a voice hollering and got scared and I had to jump.

"Q. Now, the crane was standing still, was it not?

"A. Yes, sir.

"Q. Did the operator of the crane holler at you and tell you to jump?

"A. I couldn't figure out who it was.

"Q. To your knowledge, Mr. Koserkoff, did anybody from the Chesapeake & Ohio Railway Company order you or tell you to jump off the crane?

"A. I heard a voice, but I don't know who it was, whether it was the operator of the crane, or who it was that - - -"

JOHN POVEY, *Direct*, Page 84a

"Q. Do you know if it was moving at that time?

"A. If it was moving it would be awful slow. I couldn't say for sure.

"Q. Now, where was the crane after you felt the bump on the ladder; where was the crane then?

"A. Right against the ladder, base of the ladder.

"Q. Do you know if the crane hit the ladder?

"A. I didn't see it hit but it was at the base of the ladder when I looked down and saw the man fall to the ground.

"Q. Did the ladder move any?

"A. It slid a little bit.

"Q. Which way?

"A. Toward the forward end of the ship.

"Q. Do you know how far?

"A. Maybe a foot or two."

JOHN POVEY, *Direct*, Page 88a

"Q. Did you hear anybody shouting at this time?

"A. I heard a number of people shouting.

"Q. Do you recall any words being said by anybody?

"A. Not any specific words other than the man that called to me when I was going to leave the ship."

JOHN POVEY, *Direct*, Page 90a

"A. So, I just held onto the top of the ladder and at that—he took possibly two steps down the ladder, or three when a man called to me hollering, 'goodby'."

NANCY WAXLER, *Direct*, Page 93a

"Q. Could you see your father on the ladder at any time?

"A. Yes, I did.

"Q. Do you know where the crane was in relationship to the ladder when you first saw your father?

"A. No.

"Q. Did you see that crane move at any time while your father was on that ladder?

"A. Yes, I did.

"Q. Tell us what your father did. Tell us what you saw your father do, if anything, at the time.

"A. I seen my father coming down the ladder and he had his back to me. And the crane moved up right next right in front of the ladder, and he come off the ladder onto the crane and jumped to the ground."

Based upon this testimony, the jury found the railroad liable for the seaman's injury.

The Court of Appeals reversed the judgment and ordered the complaint dismissed.

REASONS FOR GRANTING THE WRIT

1. A conflict of circuits is apparent on the issue of the maritime and non-maritime status of the shore crane and the applicability of the Admiralty Extension Act, 46 U.S.C. 740. *McKnight* v. *N. M. Paterson & Sons, Ltd.*, 286 F.2d 250 (6th Cir. 1960), cert. denied, 368 U.S. 913; *Forlcin* v. *Furness Withy & Co.*, 323 F.2d 638 (2nd Cir. 1963); *contra*, *Deffes* v. *Federal Barge Lines, Inc.*, 361 F.2d 422 (5th Cir. 1966), cert. denied, 385 U.S. 969; *Spann* v. *Lauritzen*, 344 F.2d 204 (3rd Cir. 1965), cert. denied, 382 U.S. 938, rehearing denied, 382 U.S. 1000; *Huff* v. *Matson Navigation Co.*, 338 F.2d 205 (9th Cir. 1964), cert. denied, 380 U.S. 943; *Law* v. *Victory Carriers*, 5th Cir., No. 28451, September 16, 1970, rehearing denied, November 3, 1970 (not yet reported).

2. Whether the stevedore is liable directly to a member of the crew of the vessel it is discharging for an unseaworthy condition it creates regardless of negligence. *Sanderlin* v. *Old Dominion Stevedoring Corp.*, 385 F.2d 79 (4th Cir. 1967).

3. The Circuit Court of Appeals invaded the province of the jury by reweighing the evidence and making new inferences and findings of fact. The holding is contrary to this Court's rulings in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957); *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959); *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523 (1956); *Ferguson* v. *Moore-McCormick Lines, Inc.*, 352 U.S. 521 (1957).

ARGUMENT

I. A. Where a Shoreside Crane Is Discharging Cargo from a Vessel, the Circuits Are in Conflict As to Its Status As an Appurtenance of the Vessel and the Applicability of Maritime Law.

The published opinion herein demonstrates that the Court of Appeals rejected the contention maritime law should apply to this case.

The Court, while noting in its opinion, "that the crane was already in use in the unloading of the 'Schoelkopf'," and that Plaintiff sought to have the case tried under maritime law, also held:

> "The conflict of law rules of Michigan, the forum state, determines what substantive law will control".

This holding is contrary to maritime law principles. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

It is quite apparent that the Sixth Circuit intended adhering to its ruling in *McKnight v. N. M. Paterson & Sons, Ltd.*, 286 F.2d 250 (6th Cir. 1960), cert. denied, 368 U.S. 913. See also, *Forkin v. Furness Withy & Co.*, 323 F.2d 638 (2nd Cir. 1963).

However, the holding that a shoreside crane discharging cargo is not an appurtenance of the vessel is in direct conflict with the holdings in at least three other circuits:

Deffes v. Federal Barge Lines, Inc., 361 F.2d 422 (5th Cir. 1966), cert. denied, 385 U.S. 969; *Huff v. Matson Navigation Co.*, 338 F.2d 205 (9th Cir. 1964), cert. denied, 380 U.S. 943; *Spann v. Lauritzen*, 344 F.2d 204 (3rd Cir. 1965), cert. denied, 382 U.S. 938, rehearing denied, 382 U.S. 1000.

Contemporaneous with the publication herein, the Fifth Circuit on September 16, 1970, reaffirmed its adherence to *Deffes*, *Huff* and *Spann*, and expanded the applicability of maritime law to warehouse equipment. *Law* v. *Victory Carriers*, 5th Cir., No. 28451, September 16, 1970 (not yet reported).

At the trial, Plaintiff persisted in claiming that the cause was controlled by maritime law. However, the Trial Judge ruled otherwise, charging the jury that contributory negligence by Plaintiff would bar his recovery. Under maritime law, this is error. *Pope & Talbot, Inc.* v. *Hawn*, *supra*.

Even though the jury's verdict has apparently rendered moot the issue of whether maritime law or the common law were applicable in regard to contributory negligence (the jury found none), the issue was again brought to the attention of the Court of Appeals in Appellee's brief in order to demonstrate to the Court that Plaintiff was found by the jury to have not been guilty of any contributory negligence.

However, in stressing to the bar its implied affirmance of *McKnight*, the Court of Appeals noted that the issue had been raised in the Trial Court, and rejected, and the ruling was being affirmed. There can therefore be no mistaking the intention of the Sixth Circuit to continue the conflict with the Third, Fifth and Ninth Circuits over the issue of shoreside equipment. The Second Circuit holds with the Sixth.

Following the issuance of the opinion of June 5, 1970, Petitioner requested rehearing specifically for reconsideration by the Court of its *McKnight* holding, pointing to the existing conflict of circuits. Rehearing was denied.

While impliedly telling the Bar that it is adhering to its ruling in *McKnight*, which is the only conclusion to be

drawn from the holding that injury caused by or through a shoreside crane unloading cargo from a steamship is controlled by the common law of the situs of the dock, and specifically that maritime law is not applicable, the Sixth Circuit, nevertheless, felt no compulsion to reconsider, leaving in limbo the conflict, which only this Court can now resolve.

With ever increasing resort by the maritime industry to the use of shoreside equipment to load and discharge vessels in the wider acceptance of containerized cargo as the most efficient and least expensive method of sea commerce, it is quite apparent that the problem of this conflict will be increasingly faced by Admiralty Courts, and should be resolved as soon as practical by this Court.

Intensifying the conflict is the Fifth Circuit's opinion of September 16, 1970, rehearing denied November 3, 1970, in the case of *Law* v. *Victory Carriers*, No. 28451 (not yet reported).

Relying on *Huff*, *Deffes* and *Spann*, the Court therein holds that a forklift driver, carrying cargo from a warehouse to the pier for lifting onto the vessel, is warranted a seaworthy vessel, extending to the state of repair of the forklift.

The Fifth Circuit "specifically rejected the arguments (1) that the doctrine of unseaworthiness applies only to equipment which is part of the traditional gear of a ship and (2) that the doctrine applies only to equipment which is attached to or touching the ship". The Court then concluded that if, in fact, the forklift, which never was, or was ever intended to go aboard the vessel, was in fact, "unseaworthy," the vessel would be liable to the longshoreman under the maritime law.

Arguing in *Law* that maritime law could not apply, the shipowner was unsuccessful in pointing out that the fork-lift was not loading the vessel, but merely delivering the cargo to the pier to a position from where it could be lifted onto the vessel.

In the case at bar, the Sixth Circuit rejects the maritime law at a point one step closer to the vessel; the equipment was actually discharging the cargo from the vessel, whether in actual contact with the vessel, i.e., with the ladder, as found by the jury; or, as re-found by the Court of Appeals, not in touch with the ladder, but nevertheless, discharging the cargo from the holds of the vessel.

The absolute and hopeless conflict is consequently both dramatically and contemporaneously demonstrated by the almost simultaneous rendition of their opinions by the Fifth and Sixth Circuits. There would seem to be a no more classic reason for this Court to accept a civil case for review to resolve a conflict of circuits.

II. B. Where a Dock Owner Interferes with a Seaman's Safe Egress from His Vessel Does Maritime Law or the Common Law Control the Seaman's Rights?

In connection with the issue of the conflict between the circuits as to the status of the crane, Petitioner further raises the issue that the dock owner may not interfere with his safe egress from the vessel to the dock, and if he does, maritime law controls.

The Court of Appeals held: "There is no evidence that the crane operator was aware of the presence of the ladder". However, the Railroad's superintendent reached Koserkoff within seconds after he fell, and was the only man on the dock, except the five seamen who left

before Koserkoff jumped and they apparently knew nothing of the accident.

The Railroad did not call either the crane operator or the superintendent to testify, leaving it for the jury to determine what was known, or should have been known to the Railroad and its employees. Just as the circumstantial evidence is clear in this case that the superintendent called the warning to Koserkoff, the same evidence supports the conclusion that the crane operator or the superintendent knew or should have known of the presence of the ladder. The Court below acknowledges that the ship docked there dozens of times, and the men used the ladder as the only means of egress from the vessel, and there were men all over it, in front of (or below) Koserkoff.

The Railroad employees just did not see what was plainly there to be seen. However, in adopting its own findings as the rule of the case, the Court of Appeals held that blocking the ladder was a non-negligent, non-causative factor in the accident.

In *Hovland* v. *Fearnley & Eger*, 110 F. Supp. 657 (E.D. Pa. 1952), the chandler's salesman left the vessel and was walking along the tracks back to his office. He was struck from behind by a crane similar to the one involved herein. The Court therein held the case under maritime law because the crane was an appurtenance of the vessel.

We submit that *Hovland* has support in *Litwinowicz* v. *Weyerhaeuser S.S. Co.*, 179 F. Supp. 812 (E.D. Pa. 1959), and that both are now fully confirmed by this Court's holding in *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206 (1963).

Should maritime law control this cause, then the Sixth Circuit's indecision over contributory negligence and as-

sumption of the risk could also be resolved. This Court and all other Courts have consistently held that the doctrine of assumption of the risk cannot be charged under the semantic device of calling it contributory negligence.

Since the jury did not find Plaintiff guilty of any wrongful conduct, it is probable that the Sixth Circuit is applying some concept of state law to charge him with contributory negligence by his assumption of the risk in jumping from the crane in reflex reply to the warning shout. This would be an erroneous application of maritime law:

The Arizona v. *Anelich*, 298 U.S. 110 (1936).
Socony-Vacuum Oil Co. v. *Smith*, 305 U.S. 424 (1939).
Jacob v. *City of New York*, 315 U.S. 752 (1942).
Movible Offshore Co. v. *Ousley*, 346 F.2d 870 (5th Cir. 1965).

Smith v. *United States*, 346 F.2d 449 (4th Cir. 1965), holding that a seaman may not be charged with assumption of the risk by calling it contributory negligence.

This action was commenced under the Jones Act, 46 U.S.C. 688, and the General Maritime Law. *The Osceola*, 189 U.S. 153 (1903). After the compromise settlement with the employer-shipowner, the action continued against the dockowner-stevedore.

The seaman is entitled to safe ingress and egress to and from his vessel. *Rush* v. *Cargo Ships & Tankers, Inc.*, 360 F.2d 766 (2nd Cir. 1966); *Dangovich* v. *Isthmian Lines, Inc.*, 327 F.2d 355 (2nd Cir. 1964); *Superior Oil Co.* v. *Trahan*, 322 F.2d 234 (5th Cir. 1963). Gangway injuries fall within this duty to provide safe ingress and egress. See compilation of cases, Norris, Law of Seaman 2nd, Vol. 2, Page 336. (This section has not yet been published in the Third Edition—now being prepared).

The First Circuit recognizes that the duty to provide seamen with safe passage along the dock extends to the dockowner. *Gadowski* v. *Union Oil Co.*, 326 F.2d 524 (1st Cir. 1964). However, in this case, we are faced with the attempt of the seaman to get off the ship onto the dock.

In this case, the evidence was that the crane moved up against the boarding ladder (the only practical gangway for Lakes ore ships) blocking what seemed to be safe descent for the three men on the ladder at the moment. There is no other way logically to explain the facts of the safe descent of three other seamen in front of them, or the bump and movement of the ladder one-two feet along the deck rail.

By moving against the ladder, the crane thereby became a part of the gangway. It no longer was part of the dock even if we presume, but not conceding, that prior to touching the gangway ladder, it was not maritime equipment.

Therefore, the Maritime Extension Act, 46 U.S.C. 740, is applicable.

We realize this Court's holding last term that longshoremen injured on the dock by the erratic swing of the ship's boom, are not subject to the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. However, that was a case of strict statutory construction, which specifically did not overrule the rights of recovery of general damages under the maritime law by longshoremen injured under similar circumstances. *Gutierrez* v. *Waterman S.S. Co. supra*; *Strika* v. *Netherlands Ministry of Traffic*, 185 F.2d 555 (2nd Cir. 1950), cert. denied, 341 U.S. 904; *Burrage* v. *Floth Mercante Grancolombiana*, 5th Cir., No. 28077, September 10, 1970 (not yet reported).

II. C. The Railroad Acting As Stevedore Had the Duty to Perform Its Discharge Operations in a Workmanlike Manner, and Owed to All Seamen Within Its Ambit the Warranty of Seaworthiness.

This point was not raised below. The jury found for the Plaintiff on the more difficult basis of common law negligence. There seemed to be no reason on the appeal to raise the issue of the unseaworthiness created by the Railroad and its liability to a crewman for injury caused by the unseaworthiness. However, the Court of Appeals seemed to disagree with the jury on the Railroad's negligence. Petitioner submits he does not have to prove negligence. The duty to provide a seaworthy vessel is absolute and non-delegable, and applies regardless of common law concepts of negligence, foreseeability, knowledge and notice.

Mitchell v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960).
Seas Shipping Co. v. *Sieracki*, 328 U.S. 85 (1946).

The vessel and its owner cannot avoid this duty even by acting as its own stevedores. *Jackson* v. *Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967); *Reed* v. *S.S. Yaka*, 373 U.S. 410 (1963).

In *Sieracki, supra*, and in *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1951), this Court held that this duty extends to the stevedoring specialists, acting as independent contractors, who perform the seaman's traditional work of loading and unloading the ship's cargo, in that on behalf of the vessel, the stevedore can breach this duty to the longshoreman-seaman.

This Court held soon thereafter that this duty of workmanlike service is implied (if not express) in the stevedoring contract. *Ryan Stevedoring* v. *Pan-Atlantic S.S. Corp.*, 349 U.S. 926 (1955).

If a stevedore brings a piece of equipment aboard the vessel which has a latent defect; upon activation of that latent defect, it causes injury to one of its own employees, the vessel is rendered unseaworthy, regardless of the fact that neither the stevedore nor the shipowner were negligent. *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396 (1954), aff'g, *Petterson* v. *Alaska S.S. Co.*, 205 F.2d 478 (9th Cir. 1953). The stevedore thereby imposes vicarious liability on the shipowner for injury to the stevedore's own employee.

However, the Fourth Circuit holds that if the same unseaworthy condition caused injury to a member of the crew of the vessel, the crewman could directly sue the stevedore for breach of the warranty of seaworthiness. *Sanderlin* v. *Old Dominion Stevedoring Corporation*, 385 F.2d 79 (4th Cir. 1967).

As a consequence, it is quite apparent that the Sixth Circuit's failure to find negligence on the part of C. & O. R. Co., herein is in conflict with (not only the jury), but the Fourth Circuit, which holds that negligence is not a necessary element of proof.

This Court should resolve this conflict of circuits.

III. The Court of Appeals Erred in Reversing the Judgment Based on a Jury Verdict by Substituting Its Inferences and Findings for the Jury's.

This Court held, and has often repeated, the mandate to lower Courts reviewing jury verdicts:

> "Courts should not assume that in determining these questions of negligence juries will fall short of the fair performance of their constitutional functions." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 62 (1949).

We will attempt to demonstrate by a catalogue of permissible alternate findings, those of the Sixth Circuit and those of the jury, that the appellate court erroneously deviated from recognized guidelines of appellate review of jury verdicts, and that such error is quite apparent to the trial bench and bar as a guide to the future confidence in jury trials throughout the Sixth Circuit.

The Railroad's appeal from the jury verdict failed to assign any error in any charge or ruling of law given by the Trial Judge. The Respondent merely sought a trial *de novo* on issues of fact, and the Court of Appeals granted this form of appeal, demonstrating its lack of confidence in the performance of jurors. This is quite apparent from the restatement of facts in the opinion, which, while possibly supportable in the record, can, at best, only represent alternative findings to those which the jury made and was permitted to make:

(a). The Court of Appeals found:

> "It is also a fair inference that the brittleness of his bones foreclosed the 73-year old Plaintiff's unsuccessful imitation of the conduct of his younger companions".
>
> * * *
>
> "The real cause of his injuries was Plaintiff's erroneous calculation that he could jump the same distance to the ground as had his companions. He failed to take into account his age and the likely brittleness of his bones".

There is nothing in the record to suggest these inferences. In fact, the record demonstrates that 73-year old Staphan L. Koserkoff was holding down a job in very trying work as a seaman, sailing and working seven days weekly; was a productive member of society in excellent health at the time of the accident. The jury's findings of prior good health were permissible under the direct evi-

dence, while those drawn by the Court were apparently drawn by hindsight in that the accident prevented Koserkoff from thereafter competing in the labor market, forced his early retirement from gainful employment, and relegated him to living on Social Security.

(b). The Court of Appeals found:

> "If we may assume, which we do not, that the C. & O. was negligent in moving its crane to a position where it interfered with the use of the ladder as a way of egress from the ship, we are unable to find that such conduct was a proximate cause of the Plaintiff's decision to adopt what proved to be a dangerous maneuver for him. Choosing not to wait at a place of safety, his jump therefrom was his own voluntary act".

The jury found the Railroad was negligent in blocking the ladder, and caused Plaintiff's injuries. The jury was permitted to determine that the crane platform was not a safe place for Koserkoff at that time, by weighing his testimony, ". . . I got scared. . ."

The inference drawn by the Court of Appeals ignores the testimony of the Plaintiff, his daughter and seaman Povey.

In being asked why he didn't go all the way down the ladder, Koserkoff answered:

> "A. Before I make up to the bottom, their company pull out the crane against the ladder."

His daughter, Mrs. Waxler, testified:

> "A. I seen my father coming down the ladder and he had his back to me. And the crane moved up right next, right in front of the ladder, and he come off the ladder and jumped to the ground."

Seaman Povey was on the deck about to go down the ladder behind Koserkoff. However, a friend called good-

by to him, and while his attention was diverted to his friend, he felt a bump on the ladder; and his testimony continued:

> "Q. Now where was the crane after you felt the bump on the ladder; where was the crane then?
> "A. Right against the ladder, base of the ladder.
> "Q. Do you know if the crane hit the ladder?
> "A. It slid a little bit.
> "Q. Which way?
> "A. Toward the forward end of the ship.
> "Q. Do you know how far?
> "A. Maybe a foot or two."

These excerpts from the testimony further demonstrate the erroneous conclusion of the Court of Appeals: "That there is no other evidence suggesting that the bump was not caused by Plaintiff stepping off the ladder". Both the Plaintiff and his daughter testified that the crane moved against the ladder while Plaintiff was climbing down for shore leave.

Then we examine the Court of Appeals' findings that Plaintiff chose not to wait in a place of safety, and that his jump was his own voluntary act. The jury should be presumed to have adopted the Plaintiff's testimony that he was standing on the crane assessing his position when:

> "I heard a voice hollering and I got scared and had to jump."

According to the testimony, Povey did not hear anybody on the ship call to the Plaintiff to get off the crane. There were only two other men in the area, the crane operator and the Railroad's dock foreman, who reached the Plaintiff first, seconds after the accident.

The foreman was not called to testify; nor was the crane operator. The circumstantial evidence is such that

the jury could reasonably conclude the warning came from the foreman.

Regardless of who it was that called to Plaintiff, "Get off that crane", even if it were a total stranger to the case, a good Samaritan, if you will, the Plaintiff had every justification for his fear and he jumped. He certainly could not see what was happening behind him. For all he knew, a multi-ton bucket was about to hit him, or a load of spilling ore about to pour over his head, or the revolving car about to shove him off. It was a jury issue.[2]

The jurors did not feel his jumping was a voluntary departure from a place of safety, and obviously believed a warning call reasonably caused him to jump. He testified ". . . and I got scared and *had* to jump." This testimony negates any voluntary act on his part, because the jury obviously adopted it as fact, and it thereupon should have been non-reviewable on appeal.

(c). The Court of Appeals found:

> "At that time he could have chosen to wait until the crane had ceased to block his way. He could have remained on the ladder until the crane had cleared it, or he could have stepped on the box of the crane and there waited for the crane to move away from the ladder."

This inference was completely and permissibly rejected by the jury as a required standard of conduct for one's own safety. The jurors had a more realistic grasp of the facts than the appellate panel.

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2. Petitioner further submits in this regard, that the appellate findings ignore Rule 15 (b), (c), F.R.C.P., which automatically amends the pleadings to conform to the evidence, particularly ambiguous pleadings, or those plead in the alternative. Holding a party to the pleadings rather than the evidence would seem to revert trials back to mid-nineteenth century standards of lawyer-jousting without regard or concern for facts or justice.

Does a seaman have a right to shore leave?
This Court said "Yes".
***Warren* v. *United States*, 340 U.S. 523 (1951).**

Koserkoff was entitled to go ashore to visit with his daughter at that moment. The Railroad had no right interfering with his time off, for even one second, much less, as the Court of Appeals held, for an indeterminate time. The opinion below alters the rights of a seaman to shore leave.

There was no evidence in the record and the opinion below cites none that would indicate the crane was going to move away from the ladder, or when. We do not believe, and the jury agreed, that Koserkoff was required to remain imprisoned on the ladder or on the crane, for some indefinite period of time, particularly in the face of a shouted warning, "Get off that crane," which the jury felt justified him in hurriedly getting off the crane: ". . . and I *had* to jump."

(d). The Court of Appeals found:

> **"Plaintiff's brief to this Court however takes the position that a jury could draw a legitimate inference that the shouted command must have come from the crane operator or some representative of the defendant. We find no circumstances from which such an inference could be legitimately drawn".**

This summary and statement is seen to be clearly erroneous. The circumstantial evidence permits the jury's conclusion, if such a finding is even needed to make a case.

(e). The Court of Appeals found:

> **"When Plaintiff became aware of the situation, he had available to him two places of safety, one to remain on the ladder until the crane was moved away from it, or to remain on the crane. Neither of which was shown to be a place of danger."**

We know of no such proposition of law. If this rule of law is to be adopted, it would be an illogical concept without reasonable foundation in human experience, which the jury understood, or basis in *stare decisis*, which the trial judge understood.

The jurors believed it to be a place of danger, ". . . I got scared. . . ." The Court of Appeals erred in rejecting the jury's finding.

(f). The Court of Appeals found:

> "We believe also, that it portrays that Plaintiff's voluntary act in jumping from the crane was the immediate cause of his injuries, and that no negligence of defendant was the cause of his jumping".

The jury obviously found otherwise on both facts. This Court held it strictly a jury function to weigh a seaman's choice of alternatives to correct the misfeasance of the defendant, to determine which conduct was the proximate cause of the injuries, and which was negligent. *Ferguson* v. *Moore-McCormick Lines, supra.* The verdict in *Ferguson* was reinstated by this Court on the seaman's testimony that his orders were that he must give prompt immediate service to the waiters and his unfailing response to that order, and that his act of choosing a dangerous tool was therefore neither voluntary, nor negligent.

(g). The Court of Appeals found:

> "There is no other evidence suggesting that the bump he felt was not caused by Plaintiff stepping off the ladder".

This statement of the Court of Appeals is wholly without basis in the record. When we examine the testimony of both Mrs. Waxler and the Plaintiff that the crane moved against the ladder while he was climbing down, it is apparent that the Appellate Court reweighed the testimony

and made new findings of fact. There isn't the slightest evidence that the Plaintiff's stepping off the ladder did or could have moved it one or two feet (as described by Povey) in the direction the crane was moving.

(h). The Court of Appeals found:

> "The real cause of his injuries was his erroneous calculation that he could jump the same distance as had his companions. He failed to take into account, his age and the likely brittleness of his bones".

Again examining this conclusion as to proximate cause, we see the Court of Appeals stating that Plaintiff carefully thought out his decision to jump. Actually, Plaintiff was standing on the crane only momentarily, anxiously wondering and trying to figure out just what to do, when he heard the warning. The quality of his conduct at this juncture was for the jury to decide, not for the Court. It was this type finding on proximate cause by a reviewing Court that this Court considered error in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S., at 504:

> "We interpret the foregoing to mean that the Missouri Court found as a matter of law that the Petitioner's conduct was the sole cause of his mishap".

The warning in and of itself may have been non-negligent and may have been given, and was probably given to warn Koserkoff of imminent danger to his safety, which seems to be a reasonable inference; but the Court of Appeals erred in holding as a matter of law that the danger was of his own creation. This finding also contradicts the Sixth Circuit's other finding that there was no danger.

Under the Trial Court's charge, the jurors obviously found that Koserkoff acted as a reasonable man under all of the circumstances then and there existing, and was, himself, not guilty of any contributory negligence in causing his own injuries.

Only by overlooking his own testimony (which is not referred to in any statement or reference in the reversing opinion) that the crane moved against the ladder while he was climbing down, could the Appellate Court logically arrive at this conclusion and the legal holding: "It is familiar law that if a person voluntarily exposes himself to danger . . ."

These legal precepts would consequently have no place in this case, but for the exclusion from appellate consideration of the Plaintiff's testimony. Nor would the lower Court have erroneously concluded that the Plaintiff was relying on testimony contrary to his own to make a case; when, in fact, no such testimony was ever given.[3]

The inference drawn by the Court of Appeals: "There was no other evidence suggesting that the bump he (Povey) felt was not caused by Plaintiff stepping off the ladder", is completely contrary to all burdens placed on a Plaintiff in a jury trial. Plaintiff testified that the crane moved against the ladder while he was climbing down, and his daughter saw the same thing and so testified. The jury believed them.

There is no concept of law known to Petitioner, and the Court of Appeals cites none, that requires a Plaintiff in a personal injury case to eliminate every single possible cause for his injuries, particularly where he gives direct evidence as to the specific and direct cause. The burden of proving causation had apparently been resolved by the jury. Plaintiff was not required to prove negatives.

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3. In fact, on this point, the Sixth Circuit attributed the Railroad's legal brief to the injured seaman, and then proceeded to demolish it. Plaintiff's appellate brief argued that the Railroad's principal argument was without foundation in the record, and required no response.

Petitioner readily concedes that this section of his brief is more or less, a rehash of the jury arguments. However, the very point of this petition is that the Court of Appeals adopted the jury arguments of the Railroad as the opinion of the Court in reversing the jury verdict, but refused to give any weight to the reasoning adopted by the jurors.

It is therefore respectfully submitted that in the cause at bar, the Court of Appeals went beyond the permissible bounds of judicial review of jury verdicts. The compounded error of the entire opinion is readily explained by the Court of Appeals' oversight of the Plaintiff's own key testimony: "Before I make up to the bottom, their company pull out the crane against the stepladder", and rejection of the weight given by the jury to the testimony: "and I got scared and had to jump".

Consequently, the record fails to disclose, as held by the Court of Appeals that "as a matter of law, the Plaintiff was guilty of contributory negligence", which Petitioner respectfully submits was, in fact, a jury issue; or the new findings that no negligence of Respondent was shown to have contributed to the accident, which is also a jury matter:

> "The very essence of (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable". *Tennent* v. *Peoria & P.U.R. R. Co.*, 321 U.S. 29, 35 (1944).

It is quite apparent a reading of the published opinion demonstrates that the Court of Appeals did not permit the jurors to perform that function.[4]

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4. The Sixth Circuit of late, has been consistently reversing jury verdicts and non-jury verdicts by reweighing the evidence. The tenor of recent opinions out of that Court indicates a complete lack of confidence of jury trials and one cannot read those opinions without feeling that the Court considers the verdicts as being the results of whim and caprice.

In the *Rogers* case, 352 U.S., at 505-506, this Court established certain criteria for review where alternative inferences can be drawn from the evidence and the further burden on the plaintiff to exclude alternative theories of causation:

> "The opinion may also be read as basing the reversal on another ground, namely, that it appeared to the Court that the Petitioner's conduct was at least as probable a cause for his mishap as any negligence of the Respondent, and that in such case, there was no case for the jury. But, that would mean that there is no jury question in actions under this statute, although the employer's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. The Missouri Court's opinion implies its view that this is the governing standard by saying that the proofs must show that 'the injury would have not occurred, but for negligence' of the employer, and that 'the test of whether there is causal connection is that, absent the negligent act, the injury would not have occurred'. That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury".

However, the Court of Appeals herein deviated from those standards in several instances which are quite apparent from the published opinion.

For instance, there was the inference of brittle bones in the aged as a cause of their injuries, the inference that both the ladder and the crane were havens of safety, the

rulings of law that Koserkoff's jumping was voluntary from a haven of safety and was the sole cause of his injuries, that he had no right to pay any heed to the warning shouts, and that he did not offer proof eliminating alternative causes of the movement of the ladder. All of these findings would seem to exceed the scope of judicial review set out from the *Rogers* case as cited above. See also, *Webb* v. *Illinois Central R. Co.*, 352 U.S. 512 (1956), in which this Court specifically held that a plaintiff need not eliminate all possible causes of his accident if he establishes a probable cause, even by a series of events.

The *Rogers* case, at page 506, further establishes the test of what to send to a jury:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought".

And further, the duties of judges in testing the quality of the verdict:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry, whether with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities". 352 U.S. 506-507.

In summary, Petitioner respectfully submits that: "Issues of negligence therefore, call for the exercise of common sense, and sound judgment under the circumstances of the particular cases," *Schulz* v. *Pennsylvania R. Co.*, 350

U.S. 523, 525 (1956), and that this test was met at the trial level. The Trial Judge recognized this principle of law by the entry of his order denying post-trial motions in holding upon his own clear recollection of the testimony that there was no merit in the motions. The Court of Appeals erroneously concluded otherwise, and the judgment based on the jury verdict should be reinstated.

CONCLUSION

It is respectfully submitted that the Court grant this Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit for the purposes of resolving the maritime conflict between circuits as spelled out herein, and to define the duties of a stevedore to the ship's crewmen relative to its obligation to perform its contract in a workmanlike manner, and for the concurrent liability for unseaworthy conditions it creates. The Court is also asked to determine whether or not the Court of Appeals adhered to recognized principles of appellate review of jury verdicts, and that the jury verdict be reinstated.

Respectfully submitted,

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I hereby certify that copies hereof were mailed to Walter A. Kleinert, 2964 Penobscot Building, Detroit, Michigan, and Robert A. Straub, Room 407, No. 1 Northland Plaza, 20755 Greenfield Road, Southfield, Michigan.

.....

ARTHUR ROTH

STATUTES INVOLVED

The pertinent provisions of the Admiralty Extension Act, are as follows:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to principles of law and rules of practice obtaining in cases where injury or damage has been done and consummated on navigable water."
>
> Act of June 19, 1948, ch. 526, 62 Stat. 496, 46 U.S.C. 740.

THE JONES ACT

§ 688. Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, ch 153, § 20, 38 Stat 1185, June 5, 1920, ch 250, § 33, 41 Stat 1007.)

Nos. 19046 and 20016

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STAPHAN L. KOSERKOFF,
Plaintiff-Appellee and Cross-Appellant,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant-Appellant and Cross-Appellee.

APPEAL from the U. S. District Court for the Eastern District of Michigan.

Decided and Filed June 5, 1970.

Before CELEBREZZE and COMBS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

O'SULLIVAN, Senior Circuit Judge. The Chesapeake and Ohio Railway Company appeals from a judgment for $22,500 in favor of plaintiff Staphan L. Koserkoff, entered upon a jury verdict in said amount. Appellant, the C & O asserts that a verdict should have been directed in its favor because the evidence disclosed that, as a matter of law, plaintiff was guilty of contributory negligence, and that such evidence was insufficient to permit a jury to find that the railroad was guilty of any negligence that was a proximate cause of plaintiff's injuries. Plaintiff's cross appeal charges that interest on his judgment should accrue from date of filing the complaint instead of from the date of judgment.

We reverse and remand for entry of judgment for defendant. The cross-appeal will be dismissed.

The allegedly tortious conduct of the railroad occurred at Toledo, Ohio, and the suit was commenced and tried in the United States District Court for the Eastern District of Michigan, Southern Division. The conflict of law rules of Michigan, the forum state, determines what substantive law will control *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 497 (1941); *Glen Falls Ins. Co.* v. *Danville Motors, Inc.*, 333 F(2) 187, 191 (6th Cir. 1964). Michigan holds that the substantive law of Ohio, the place of the casualty, will be followed. *Petrusha* v. *Korinek*, 237 Mich. 583, 589 (1927).

On October 3, 1962, plaintiff Koserkoff, then 73 years old, was employed as a night porter or cook aboard the SS Schoelkopf, a vessel owned by the American Steamship Company. He had been so employed for several years. The Schoelkopf berthed at the C & O dock in Toledo, Ohio, at about 7:30 in the morning. Koserkoff was familiar with this dock, including the C & O crane which operated upon railroad tracks parallel to the docked ship. There was evidence that the crane was already in use in the unloading of the Schoelkopf. Members of the ship's crew, including plaintiff, were about to go ashore. A watchman, also a member of the crew, lowered a ladder over the side of the ship to the dock, a distance of about 12 feet. At least three members of the departing crew climbed down the ladder to the dock without incident. Two other members of the crew proceeded down the ladder but, because of the nearness of the C & O crane to the bottom of the ladder, stepped off the ladder on to the hopper of the crane and then jumped from there to the ground, a distance of some six or eight feet. The plaintiff followed his fellow crew members, climbing down the ladder, stepping on to the hopper of the crane, and then jumping to the ground. The plaintiff, however, was injured—he broke his heel—when he landed on the surface of the dock. Whatever conflict

there may be in the evidence, it is clear that the presence of the crane at or near the foot of the ladder either necessitated or suggested the route taken by plaintiff and his fellow crew members. It is also a fair inference that the brittleness of his bones foreclosed the 73 year old plaintiff's successful imitation of the conduct of his younger companions.

This suit began as a maritime action by Koserkoff against American Steamship Company, wherein the complaint asserted a cause of action arising out of the Merchant Marine Act, 18 USC § 688 (The Jones Act.) He charged that his injuries were brought about by the negligence of the owners of the boat in that:

> "Defendant failed to provide a watch at the head of the ladder and failed to warn members of the crew • • • that the crane was in operation in the area.
>
> "Defendant further failed to warn the operator of the crane that crew members, particularly the plaintiff, were leaving the vessel at the aforesaid time and place."

In its answer to the foregoing, the American Steamship Company charged defensively:

> "That any accident or injury plaintiff may have sustained while in the employ of defendant was caused or contributed to by his own carelessness, inattention and negligence."

Stipulating with American Steamship Company, plaintiff later joined the appellant Chesapeake and Ohio Railway Company as a defendant. The amended complaint asserted a cause of action against appellant under the general admiralty and maritime law and under the common law. The negligence charged was substantially that charged to American Steamship Company, but also averred that the

ladder used was owned by the C & O. The latter statement was not true.

A settlement was made, however, between plaintiff and the Steamship Company by the latter's payment to Koserkoff of $1,928 for maintenance and cure and $7,500 damages. A covenant not to sue was given to American Steamship Company by Koserkoff. The settlement agreement provided that plaintiff would not dismiss or settle his suit against the C & O without consent of the Steamship Company; that if plaintiff recovered more than $25,000, but less than $32,500, plaintiff was to pay to the Steamship Company the excess of his recovery over $25,000; that if his recovery exceeded $32,500, he was to pay the Steamship Company $7,500; that if his recovery was less than $25,000, plaintiff would not repay any part thereof to the Steamship Company. American Steamship Company was thereupon dismissed from the case.

The case was tried and submitted to the jury upon common law negligence. Under the law of Ohio, contributory negligence is a defense in bar, as it is under the law of Michigan.

Plaintiff was familiar with the C & O dock, his ship having docked there about a dozen times during each of several summers while he was employed on the ship. As, stated, three of the six crew members who used the ship's ladder had completed their trip to the dock. Koserkoff, however, observed that the two who immediately preceded him stepped from the ladder on to the crane and then jumped to the ground. It is clear that the nearness of the crane to the bottom of the ladder necessitated, or suggested, the route followed by plaintiff and two of his crew mates. Plaintiff testified that the C & O crane was standing still when he started down the ladder, was standing still when he was about three quarters of the way down,

and was standing still when he stepped on to the crane. He said there was no movement of the crane at the time he jumped. He said that when he was on the crane someone hollered "get off that hopper". He became frightened and jumped. He did not know who hollered at him and there was no evidence that any employee or agent of the C & O was the one who hollered to plaintiff. Plaintiff was not asked, nor did he give any testimony that except for the shouted command he would have waited on the hopper until movement of the crane allowed him to go to the ground on the ladder, or otherwise than jumping. He said he was frightened by the shouted command. Plaintiff gave an affirmative answer to the question, "Now * * * Mr. Koserkoff, when the ladder was lowered from the Schoelkopf down to the ground that crane was there, right there, standing still then wasn't it?"

We are of the view that the above testimony did not disclose that negligence of defendant could be found to have been a proximate cause of plaintiff's injuries. We believe also that it portrays that plaintiff's voluntary act in jumping from the crane was the immediate cause of his injuries, and that no negligence of defendant was the cause of his jumping. Before plaintiff had reached the place on the ladder from which he stepped on to the crane, he became aware that descent on the ladder to the dock itself could not be accomplished except by following the lead of the crew members who chose to jump from the crane without waiting for the crane to be moved out of the way. When plaintiff became aware of the situation, he had available to him two places of safety—one to remain on the ladder until the crane was moved away from it, or to remain on the crane, neither of which was shown to be a place of danger. His testimony was, however, that he heard someone holler to get off the crane. Neither the original nor the amended complaint makes any claim that

an exhortation to jump caused plaintiff to do so. There was no evidence that defendant was responsible for such shout. When testimony to this effect was given at the trial, objection was made to it and plaintiff's counsel very correctly observed:

> "But I don't think that [referring to the shouting] is the negligence, anyway. I think he is entitled to tell what he heard, what caused him to get off the crane."

Plaintiff's brief to this Court, however, takes the position that a jury could draw a legitimate inference that the shouted command must have come from the crane operator or some representative of the defendant. We find no circumstance from which such an inference could be legitimately drawn. No such claim was made by the pleadings. Plaintiff's counsel admitted that such shouting was no part of plaintiff's claim of defendant's negligence. We hold that this circumstance cannot be employed by plaintiff to make out a case of defendant's negligence or to ameliorate the clear fact that the activity which caused the injury to plaintiff was his own voluntary act.

Under his clear testimony, plaintiff, while on the ladder, had become aware that the position of the crane would not allow him to complete his trip to the dock on the ladder. At that time he could have chosen to wait until the crane had ceased to block his way. He could have remained on the ladder until the crane had cleared it, or he could have stepped on the box of the crane and there waited for the crane to move away from the ladder. If we may assume, which we do not, that the C & O was negligent in moving its crane to a position where it interfered with the use of the ladder as a way of egress from the ship, we are unable to find that such conduct was a proximate cause of the plaintiff's decision to adopt what proved to be a dangerous maneuver for him. Choosing not to wait at a place of safety, his jump therefrom was his own voluntary act.

There was evidence that the C & O's crane had already begun unloading the boat. There may be a serious question whether the crane operator was required to make sure at every point along its track that no one would introduce a ship's ladder between the boat and the crane and to anticipate that members of the ship's crew would not wait for the crane to move out of the way before stepping off the ladder on to the crane and then jumping to the ground. There is no evidence that the crane operator was aware of the presence of the ladder. This is not a case of last clear chance.

It is familiar law that if a person voluntarily exposes himself to a danger, he may not cast responsibility upon another for the consequences of such act. If in this case the C & O could be found guilty of wrongdoing in placing its crane at a place which blocked the use of the ship's ladder as a way to the floor of the dock, such misconduct was quite apparent to plaintiff and his companions and had come to rest as a causative agent before their choice of alternative routes of egress.

The Ohio Supreme Court in *Centrello* v. *Basky*, 164 Ohio St. 41, 48 (1955), quoted with approval the language of *Weber* v. *Eaton*, 160 F.(2) 577, 578 (CA D.C., 1947), as follows:

> "Contributory negligence and assumption of risk are so closely related as sometimes to be almost if not entirely, indistinguishable. In cases which do not arise between master and servant, the two terms may well be considered synonymous in the sense that *one who voluntarily places himself in a perilous position, when the potential danger is apparent*, is not exercising ordinary care for his own safety." (Emphasis supplied.)

In *Greyhound Lines* v. *Martin*, 127 Ohio St. 499, 502 (1934), the Ohio Court also said:

> "One cannot complain of the lack of warning of conditions involving danger to himself when he has full knowledge of such conditions as if he had been apprised of them."

In *Cadagan* v. *Great A. & P. Tea Co.*, 298 Mich. 207, 213 (1941), the Michigan Supreme Court quoted approvingly from *Stern* v. *Franklin*, 290 Mich. 467 (1939), the following syllabus:

> "One who voluntarily places himself in, or remains in, a position which he knows or with reasonable care should know, is dangerous, cannot recover for the ensuing injury."

It may indeed be that we are here dealing with a case of pure accident. The real cause of his injuries was plaintiff's erroneous calculation that he could jump the same distance to the ground as had his companions. He failed to take into account his age and the likely brittleness of his bones. In *Modzel* v. *Norwalk Truck Lines*, 325 Mich. 693, 697, the court charged contributory negligence to a plaintiff who,

> "went into a place of obvious danger unnecessarily and without the proper regard that an ordinarily prudent man would have for his own safety."

Plaintiff properly asserts that in testing the evidence to resist a claim that a verdict should be directed, we must view the evidence in the light most favorable to the plaintiff, including whatever legitimate inferences may be drawn therefrom. He also contends that even if the plaintiff's own account of relevant events would exonerate defendant, there was other evidence—some of it contrary to plaintiff's own account—from which inferences of fact could be drawn that the C & O crane had struck the ladder, causing the plaintiff to fall to the ground. A witness Povey testified that he was a member of the crew of the

Schoelkopf on the morning of the events here involved. He saw plaintiff start to climb down the ladder and his attention was then distracted, and

> "Then I was leaning on the ladder with one arm, holding a suitcase on the other, and I felt a bump on the ladder, pretty strong bump."

He said he looked down and,

> "I saw a man flying through the air. He was about two feet off the ground when I saw him."

Then, to this question, "You mean jumping or what?" he answered, "He didn't look like he was jumping. He was in a orthodox position." He said he did not know whether the crane hit the ladder or not. There is no other evidence suggesting that the bump he felt was not caused by plaintiff stepping off the ladder. He heard no one shout to plaintiff. It could also be inferred from Povey's testimony that the crane base, from the time he first saw it until it was stopped at the ladder, moved from aft forward about 30 feet. He answered the question whether the crane was moving at the time of plaintiff's descent, "If it was moving, it would be awful slow. I couldn't say for sure." Asked where the crane was when he felt the bump, he answered, "Right against the ladder, base of the ladder."

Plaintiff's daughter, Nancy Waxler, testified that at the time of her father's injury she was waiting on the C & O dock to pick him up. She was parked in her car about 50 feet sternward from the ladder. This is her critical testimony:

> "Q. Did you see that crane move at any time while your father was on that ladder?
>
> "A. Yes, I did.
>
> "Q. Tell us what your father did. Tell us what you saw your father do, if anything, at the time.

"A. I seen my father coming down the ladder and he had his back to me. And the crane moved up right next, right in front of the ladder, and he come off the ladder onto the crane and jumped to the ground.

"Q. Do you know if the crane struck the ladder?

"A. I don't know.

"Q. Did you hear any shouting before your father jumped?

"A. No, I didn't hear anything.

• • •

"Q. Mrs. Waxler, did you see anyone on the crane with your father?

"A. No.

"Q. There were no two men that jumped just before your father?

"A. I didn't see that. I wasn't looking in that direction at the time."

Plaintiff argues that testimony of Povey and Nancy Waxler, allegedly contrary to plaintiff's account of what happened, would permit the jury to find that the crane struck the ladder and caused plaintiff to be thrown to the ground or caused him to jump on to the crane. Defendant argues in opposition that plaintiff's own testimony should be looked upon as a judicial admission allowing for no departure from its clear meaning.

We, however, will not use this case to attempt elucidation as to when it is appropriate to use the rule of judicial admissions to dispose of a lawsuit. The text of 32A, C.J.S. "Evidence" suggests our not employing it here.

> "The extent to which a party is concluded by his own testimony adverse to his contentions in the litigation has been characterized as one of the most troublesome questions of the law of evidence." 32 A, C.J.S. p. 776.

The difficulty in articulating any generally applicable rule is portrayed by these Ohio cases: *Gates* v. *Dills*, 13 Ohio App. 2d 163, 168 (1967); cr. *Niederlehner* v. *Weatherly*, 73 Ohio App. 33, 39 (1943); *Hodges* v. *Ettinger*, 127 Ohio St. 460, 462 (1934); and these Michigan cases: *Tozer* v. *Kerr*, 342 Mich. 136 (1955); *Ortega* v. *Lenderink*, 382 Mich. 218, 222-224 (1969); cf. *Connor* v. *Lake Shore & M.S.R. Co.*, 168 Mich. 29 (1911).

We do not employ the rule here. See discussion of *Ortega* v. *Lenderink*, 382 Mich. 218, 222, 223 (1969). We are, however, persuaded that neither the testimony of the witness Povey nor that of the plaintiff's daughter, either directly or by inference qualify or explain away the clear testimony of the plaintiff himself. The following is a generally applicable rule:

> "It is also to be noted in this connection that plaintiff alone testified as to the presence of ice on these hose couplers and as to the manner in which the accident is alleged to have happened. Such of his statements and testimony as is against his interest is presumed to be true and in these circumstances the rule as to directing a verdict may be stated as follows: Where a party's own testimony, if true, would defeat his right to a verdict, and such statements are not modified or explained, a verdict may be directed against him." (citations omitted) *Barnett* v. *Terminal Railroad Ass'n of St. Louis*, 228 F(2) 756, 761 (8th Cir. 1956).

In *Stein* v. *General Necessities Corp.*, 232 Mich. 322, 329 (1925), the Michigan Court stated the rule we should apply here.

> "While contradictory statements of a plaintiff may go to a jury for a sifting to discover the truth (Goonen v. Railroad Co., 218 Mich. 502), the rule is not sufficiently lax to admit a positive statement of fact, establishing contributory negligence, being rendered an

affirmative showing of due care by subsequent testimony that the first statement may or may not be true." 232 Mich. at 329.

That the distinguished District Judge was indeed troubled by the question we rule upon is portrayed by his observation, made during a discussion whether plaintiff was entitled to have the case submitted to the jury as a maritime tort as well as on common law negligence.

"Here is the way I feel about it: If your position is that the crane was loading at the time that your client came down the ladder, then I would think I would have to find as a matter of law that the boat, itself, the watchman and your client were guilty of contributory negligence, because now you are telling us that that ladder was installed while the crane was unloading and that here's a man that came down right into position where he had to get off the ladder and get on the crane and then jump up from there to get down onto the ground."

The judgment of the District Court is reversed and the cause remanded for entry of judgment for the defendant railroad, dismissing plaintiff's complaint.

PETITION FOR REHEARING, OR ALTERNATIVELY, FOR REHEARING EN BANC

The appellee, STAPHAN L. KOSERKOFF, moves the Court for a rehearing of the judgment and opinion entered herein on June 5, 1970, and for grounds therefor, represents unto the Court:

1. The Court's application of State law is contrary to the maritime jurisdiction of the United States.

2. The Court's application of State Court rules of procedure and evidence contradict the general rule that

in a Federal trial, Federal rules of procedure and evidence are applicable.

3. The Court has deprived appellee of a trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States.

4. The facts set forth in the opinion bear little resemblance to the record, but merely echo the railroad's jury arguments, which were rejected by the jury.

5. The Court has not accurately recounted appellee's legal arguments, and has distorted them into strawmen for easy toppling.

6. The Court has not ruled on Plaintiff's contention that the case was one of admiralty and maritime jurisdiction.

7. The cause should be heard en banc, and Appellee so moves.

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and

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Attorneys for Appellee

Nos. 19946 and 20016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STAPHAN L. KOSERKOFF,
Plaintiff-Appellee and
Cross-Appellant,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant-Appellant and
Cross-Appellee.

ORDER

(Filed September 10, 1970)

Before PHILLIPS, Chief Judge, CELEBREZZE, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

THIS CAUSE is before the Court on Plaintiff-Appellee's petition for rehearing, and for rehearing in banc. As no request for a rehearing in banc has been made by any judge of this Court, the petition has been considered by a panel consisting of two members of the panel which originally heard the appeal and Chief Judge Phillips.*

Upon consideration of the petition and its supporting brief, and upon reconsideration of the briefs and arguments submitted on appeal, IT IS ORDERED that the petition for rehearing may be, and it is, hereby denied.

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*Honorable Bert T. Combs, who was a member of the panel that heard and disposed of the appeal, has since resigned and he took no part in the disposition of this petition; Chief Judge Phillips was designated to act as a member of the panel to consider the petition for rehearing in place of Bert T. Combs, resigned.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 25192

STAPHAN L. KOSERKOFF,
Plaintiff,

vs.

AMERICAN STEAMSHIP COMPANY,
a corporation,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
a Virginia corporation,
Defendants.

(Filed March 20, 1969)

At a session of said court held in the Federal Building at Detroit, Wayne County, Michigan on this 28th day of March, 1969.

PRESENT: HONORABLE THOMAS P. THORNTON

This action came on for trial before the court and a jury, Honorable Thomas P. Thornton, presiding, and the issues having been duly tried and the jury having duly rendered its verdict;

IT IS ORDERED AND ADJUDGED that the plaintiff, Staphan L. Koserkoff, recover of the defendant, Chesapeake & Ohio Railway Company, the sum of TWENTY TWO THOUSAND FIVE HUNDRED ($22,500.00) DOLLARS, with interest thereon from March 14, 1969 at the

rate of 5% per annum, as provided by law, and his costs of action.

Thomas P. Thornton
United States District Judge

A true copy

Frederick W. Johnson,
Clerk

By /s/ Stewart L. Lee, Jr.
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 25192

STAPHAN L. KOSERKOFF,
Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant.

ORDER DENYING MOTION FOR JUDGMENT N. O. V.

At a session of said Court held in the Federal Building, Detroit, Michigan, on July 3, 1969.

PRESENT: HONORABLE THOMAS P. THORNTON
United States District Judge

Upon consideration of the motion of defendant filed herein entitled MOTION BY DEFENDANT FOR JUDGMENT NOTWITHSTANDING THE VERDICT, and

After oral argument in open court by counsel for the respective parties and consideration of the briefs sub-

mitted by said counsel in support of their respective positions, and

The Court having a clear recollection of the trial which took place only three and one half months ago, and

It appearing to the Court that there is no merit to the instant motion,

IT IS HEREBY ORDERED that said motion be and the same is hereby denied.

Thomas P. Thornton
United States District Judge

A true copy

Frederick W. Johnson,
Clerk

By /s/ Kathleen Farnsworth
Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 25192

STAPHAN L. KOSERKOFF,
521 Chapin Street, Toledo, Ohio
Plaintiff,

vs.

AMERICAN STEAMSHIP COMPANY,
A Corporation,

-and-

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A Virginia Corporation,
Defendants.

AMENDED COMPLAINT

Plaintiff, complaining of the defendant, respectfully states and alleges upon information and belief:

FOR A FIRST CAUSE OF ACTION

FIRST: That at all times hereinafter mentioned, the defendant, The American Steamship Company, was and still is a corporation, doing business in the State of Michigan.

SECOND: Upon information and belief, that at all times hereinafter mentioned the Defendant, The American Steamship Company, owned and/or managed and controlled a certain vessel, known as the SS J. F. SCHOELKOPF, JR., which was used in the business of commerce and navigation on the Great Lakes and their connecting tributaries.

THIRD: That on or about the 3rd day of October, 1962, the plaintiff was in the employ of the defendant, The American Steamship Company, in the capacity of a seaman.

FOURTH: That the plaintiff is a seaman, and at all times hereinbefore mentioned, there was and still is in force and effect an Act of Congress, known as the Merchant Marine Act, (Title 46, U.S.C.A.) Chapter 18, Section 688, approved June 5, 1920, Section 33.

FIFTH: That at or about 7:30 AM on the 3rd day of October, 1962, while said vessel was berthed at the Chesapeake & Ohio Railway Company Dock at Toledo, Ohio, the plaintiff was leaving said vessel by way of a ladder provided by the defendant, when, suddenly and unexpectedly, and without warning, the loading crane was moved in front of said ladder. To avoid injury, the plaintiff climbed over onto the crane, and, in order to get to safety and to avoid serious injury, he was caused to jump to the dock; thereby

sustaining a fracture of the right acrulcis. That at the aforesaid time and place the defendant failed to provide a watch at the head of the ladder; failed to co-ordinate the operation of the crane in the area of said ladder, and failed to warn members of the crew, particularly this plaintiff, that the crane was in operation in the area. Defendant further failed to warn the operator of the crane that crew members, particularly the plaintiff, were leaving the vessel at the aforesaid time and place.

SIXTH: That the defendant has neglected, failed and refused to pay any monies to the plaintiff, as a result of his aforementioned injury.

SEVENTH: That his injuries, hereinafter stated, were not caused by any negligence, fault or want of care on plaintiff's part, but wholly and solely by reason of the carelessness and negligence of the defendant, its servants, agents, and employees, acting within the scope of their employment;

(A) In negligently failing to furnish plaintiff with an adequate number of officers and co-employees, and to provide plaintiff with skilled, careful, and competent co-employees, master and other officers;

(B) In failing to furnish plaintiff with a safe place in which to do his work;

(C) In failing to supply plaintiff with a suitable and safe means, materials, and appliances in and for the performance of his work, and to maintain the same in proper condition for the proper performance of said work;

(D) In failing to promulgate and enforce proper rules in relation to the foregoing, and to inspect the aforesaid materials, appliances and means;

(E) In negligently and carelessly failing to provide a proper means of egress from said vessel at the aforesaid time and place;

(F) In failing to provide plaintiff with a safe and seaworthy vessel;

(G) In failing to have a watch at the head of said ladder at the aforesaid time and place, and to properly control and supervise the operation of the crane in the area of said ladder at the aforesaid time and place.

EIGHTH: That as a direct and proximate result of the defendant's negligence in one or more of the aforesaid matters, plaintiff then and there sustained severe and painful injuries, both externally and internally, and, more particularly, he sustained a fractured right oscalcis and a condition of traumatic arthritis of the right ankle; all of which injuries are permanent. That he became and was disabled and suffered and will in the future suffer great pain, discomfort and physical impairment; all of which injuries are permanent. Plaintiff says that he has lost and will lose great gains, which he otherwise would have made and acquired, and that he will suffer a loss of earnings in the future, and plaintiff may be required to incur obligations for medical and surgical aid and attendance and nursing care, and plaintiff was otherwise injured.

WHEREFORE, plaintiff claims judgment in the amount of FOUR HUNDRED FIFTY THOUSAND ($450,000.00) DOLLARS, plus court costs and attorney fees.

FOR A SECOND CAUSE OF ACTION

NINTH: Plaintiff repeats and realleges all the facts set forth in the First Cause of Action with the same force and effect, as though pleaded herein in full, omitting all allegations of negligence.

TENTH: Plaintiff elects to maintain this Cause of Action under the General Admiralty and Maritime Law, and, further, takes the benefits of all Statutes of the United States, modifying or extending the Common Law, right or remedy, in cases of personal injury.

ELEVENTH: That the Defendant, The American Steamship Company, failed to furnish plaintiff with a seaworthy vessel, at the aforementioned time and place.

WHEREFORE, plaintiff claims judgment in the amount of ONE HUNDRED TWENTY THOUSAND ($120,000.00) DOLLARS, plus court costs and attorney fees.

FOR A THIRD CAUSE OF ACTION

TWELFTH: Plaintiff repeats and realleges all the facts set forth in the First Cause of Action with the same force and effect as though pleaded herein in full, omitting all allegations of negligence, unseaworthiness, pain and suffering, loss of wages, dimunition of earning capacity and any and all claims, other than for amounts needed to maintain and cure himself in and about his care, while disabled and unable to work, including both past maintenance and cure and maintenance and cure for a reasonable period in the future.

THIRTEENTH: That it was the duty of the defendant to provide the plaintiff with the expenses of his maintenance and cure.

FOURTEENTH: That plaintiff, as a result of the foregoing, has expended for his maintenance and cure, while disabled and unable to work, the sum of TEN THOUSAND ($10,000.00) DOLLARS.

WHEREFORE, plaintiff demands trial by jury and judgment against the defendant in the amount of ONE

HUNDRED THIRTY THOUSAND ($130,000.00) DOLLARS, together with the costs and disbursements of this action, and, further prays that he be permitted to prosecute this action without advancement of or give security for costs under favor of the Statutes of the United States in such cases made and provided; particularly Chapter 113, 40 Statutes, 688 U.S. Code, Title 28, Section 1916.

FOR A FOURTH CAUSE OF ACTION

FIRST: That the plaintiff is domiciled in the State of Ohio, and the Defendant, The Chesapeake and Ohio Railway Company, is domiciled in the State of Virginia; and the amount in controversy exceeds the sum of TEN THOUSAND ($10,000.00) DOLLARS.

SECOND: That the Defendant, The Chesapeake and Ohio Railway Company, at all times mentioned herein, maintained and controlled a certain dock at Toledo, Ohio utilized in conjunction with plaintiff's employment by The American Steamship Company, co-defendant herein.

THIRD: That at or about 7:30 AM on the 3rd day of October, 1962, while the SS J. F. SCHOELKOPF, JR., was berthed at the Chesapeake and Ohio Railway Company Dock at Toledo, Ohio, the plaintiff was leaving said vessel by way of a ladder provided by the defendant, when, suddenly and unexpectedly, and without warning, the loading crane was moved in front of said ladder. That, to avoid injury, the plaintiff climbed over onto the crane, and, in order to get to safety and to avoid serious injury he was caused to jump to the dock; thereby sustaining a fracture of the right oscalcis. That at the aforesaid time and place the defendant failed to provide a watch at the head of the ladder, failed to co-ordinate the operation of the crane in the area of said ladder, and failed to warn members of the crew, particularly this plaintiff, that the

crane was in operation in the area. Defendant further failed to warn the operator of the crane that crew members, particularly the plaintiff, were leaving the vessel at the aforesaid time and place.

FOURTH: That plaintiff elects to maintain this Cause of Action under the General Admiralty and Maritime Law, and, further, takes the benefits of all Statutes of the United States modifying or extending the Common Law, right or remedy, in cases of personal injury.

FIFTH: That his injuries, hereinafter stated, were not caused by any negligence, fault, or want of care on plaintiff's part, but by reason of the carelessness and negligence of the Defendant, The Chesapeake and Ohio Railway Company, its servants, agents, and employees, acting within the scope of their employment:

(A) In failing to properly illuminate the area leading from the SS J. F. SCHOELKOPF, JR., at or about 7:30 AM on October 3, 1962, at the Chesapeake and Ohio Railway Company Dock at Toledo, Ohio;

(B) In failing to co-ordinate the operation of the crane in the area of said ladder on said date with the owner of the SS J. F. SCHOELKOPF, JR.

(C) In failing to warn members of the crew of said vessel, particularly the plaintiff, that the crane was in operation in the area;

(D) In failing and neglecting to warn the plaintiff, when the defendant knew, or should have known, of the dangerous conditions of the operation going on at the time in the area of said ladder.

SIXTH: That as a direct and proximate result of the defendant's negligence in one or more of the aforesaid matters, plaintiff then and there sustained severe and painful

injuries, both externally and internally, and, more particularly, he sustained a fractured right ossalcis and a condition of traumatic arthritis of the right ankle, all of which injuries are permanent. That he became and was disabled and suffered, and will in the future suffer great pain, discomfort and physical impairment, all of which injuries are permanent. Plaintiff says that he has lost and will lose great gains, which he otherwise would have made and acquired, and that he will suffer a loss of earnings in the future, and plaintiff may be required to incur obligations for medical and surgical aid and attendance and nursing care, and plaintiff was otherwise injured.

WHEREFORE, plaintiff claims trial by jury and judgment against the Defendant, The Chesapeake and Ohio Railway Company, in the sum of ONE HUNDRED TWENTY THOUSAND ($120,000.00) DOLLARS, together with the costs and disbursements of this action.

/sgd/ Victor G. Hanson
Victor G. Hanson
Attorney for Plaintiff
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Detroit, Michigan 48235
VErmont 7-4742

JURY DEMAND

Now comes the Plaintiff, STAPHAN L. KOSERKOFF, and demands a trial by jury of the within cause, as by the Statutes of the United States in such cases made and provided.

Staphan L. Koserkoff
By: /sgd/ Victor G. Hanson
His Attorney

OPPOSITION BRIEF

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 991

STAPHAN L. KOSERKOFF,
Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

To the Honorable Chief Justice of the United States and the Judges of the Supreme Court of the United States:

The Chesapeake and Ohio Railway Company, Respondent herein, submits herewith its brief in opposition to the petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit filed herein by the Petitioner, Staphan L. Koserkoff.

OPINIONS BELOW

There was no formal reported opinion of the United States District Court for the Eastern District of Michigan, Southern Division. Excerpts of the transcript in that Court, including the Judge's statements and rulings in connection with Admiralty and Maritime Law and Common Law Negligence, are reproduced in the Appendix of Respondent to this brief.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *427 F.2d 1049*. It is reproduced in Appendix A-2 through A-13 in Petitioner's Petition for Writ of Certiorari.

JURISDICTION

This is not a Seaman's Appeal, as claimed by Petitioner, and therefore *Supreme Court Rule 54* and *28 U.S.C. §1916* are not applicable.

To the extent that the reasons set forth by Respondent for denying the Writ of Certiorari are deemed to go to the jurisdiction of this Court, the Respondent respectfully asserts that this Court does not have jurisdiction to issue the writ. If, however, the Court does have jurisdiction, it is invoked under *28 U.S.C. §1254(1)*.

PREFACE TO "QUESTIONS PRESENTED."

Respondent cannot accept the questions set forth by Petitioner for the reason that none of them, particularly as to Admiralty and Maritime Law, were properly in issue before the District Court, and since none of them were properly raised by Petitioner on his Cross-Appeal to the United States Court of Appeals for the Sixth Circuit, and the "Questions Presented" improperly seek a general review of the merits of the case. If, however, this Court is of the opinion that one or more of the matters covered by Petitioner's "Questions Presented" were properly raised by Petitioner, then Respondent respectfully submits that the "Questions Presented" by this Petition should be as follows:

QUESTIONS PRESENTED

I.

Where the cause of action framed by the pleadings sounds both in Admiralty and Maritime Law and under Common Law Negligence, and by understanding of counsel for all parties the cause of action is tried by the District Court to a jury under Common Law Negligence only, may the Petitioner herein (Plaintiff below), after reversal by the Court of Appeals, now assert a cause of action under Admiralty Law and Maritime Law, to the exclusion of Common Law Negligence?

II.

Where the Petitioner (Plaintiff below), after completion of all the evidence in the trial before the District Court,

withdraws his motion to reconsider Admiralty and Maritime Law, may the same Petitioner, after reversal by the Court of Appeals, now urge before this Court the question of Admiralty and Maritime Law?

III.

Where the District Court at the conclusion of the trial charges the jury on Common Law Negligence only, to the exclusion of Admiralty and Maritime Law, and no objection thereto is made by Petitioner (Plaintiff below) as to the charge of the Court, may the same Petitioner, after reversal by the Court of Appeals, now urge error in the failure of the District Court to charge the jury as to Admiralty and Maritime Law?

IV.

Where the Petitioner (Plaintiff below) perfects a cross-appeal to the Court of Appeals, limited only as to interest on the judgment, without any cross-appeal as to Admiralty and Maritime Law, may the same Petitioner now urge before this Court on a Petition for Writ of Certiorari, the question of error in the refusal of the District Court and the Court of Appeals to consider the question of Admiralty and Maritime Law?

STATUTES INVOLVED

Respondent denies that The Jones Act, 46 U.S.C. 688 and The Admiralty Extension Act, 46 U.S.C. 740 are applicable to the present Petition for Writ of Certiorari.

RULES INVOLVED

Respondent denies that Rule 15(b)(c) of the Federal Rules of Civil Procedure, 28 U.S.C., are applicable to the present Petition for Writ of Certiorari.

In addition thereto, Respondent asserts that the following Rules are pertinent:

(a) Rule 50(b) of the Federal Rules of Civil Procedure;

(b) Rule 51 of the Federal Rules of Civil Procedure.

Both of these Rules are set forth in Respondent's Appendix A and B.

STATEMENT OF THE CASE

This was a personal injury case filed by the Petitioner, Staphan L. Koserkoff, in the United States District Court for the Eastern District of Michigan, Southern Division.

The suit began as a Maritime action by Koserkoff against his employer, American Steamship Company, wherein Koserkoff asserted a cause of action arising out of *The Merchant Marine Act, 18 U.S.C. §688 (The Jones Act).* He charged that his injuries were brought about by the negligence of the owner of the boat in that:

> "Defendant failed to provide a watch at the head of the ladder and failed to warn members of the crew * * * that the crane was in operation in the area."
>
> "Defendant further failed to warn the operator of the crane that crew members, particularly the plaintiff, were leaving the vessel at the aforesaid time and place."

In answer to the foregoing, The American Steamship Company charged defensively:

> "That any accident or injury plaintiff may have sustained while in the employ of defendant was caused or contributed to by his own carelessness, inattention and negligence."

By stipulation between American Steamship Company and Koserkoff, the latter party as plaintiff, later joined the Chesapeake and Ohio Railway Company as a defendant in said suit.

Thereafter, an amended complaint was filed as against American Steamship Company, as owner of the ship SS J. F. Schoelkopf, Jr., and The Chesapeake and Ohio Railway Company, as owner of the dock where the ship was berthed, at Toledo, Ohio.

The portion of the amended complaint applicable to The Chesapeake and Ohio Railway Company is the Fourth Cause of Action. (Petitioner's Appendix, A-19 through A-25).

In the amended complaint, under the "Fourth Cause of Action" it was asserted by Koserkoff that The Chesapeake and Ohio Railway Company owned a dock at Toledo, Ohio, used by American Steamship Company for berthing purposes; that on October 3, 1962 the SS J. F. Schoelkopf, Jr. was berthed at said dock; Koserkoff was leaving said ship by way of a ladder owned and provided by The Chesapeake and Ohio Railway Company; that suddenly, unexpectedly and without warning, a loading crane belonging to The Chesapeake and Ohio Railway Company was moved in front of said ladder; that to avoid injury, Koserkoff climbed over onto the crane, and was required to jump to the dock ground and thereby sustained a fracture of his right os calcis, resulting in permanent injury.

In the amended complaint, the claimed negligence against The Chesapeake and Ohio Railway Company was:

(1) Improper illumination of the dock area;

(2) Failure to coordinate the operation of the crane in the area of the ladder;

(3) Failure to warn the crew members of the vessel of the operation of the crane; and,

(4) Failure to warn Koserkoff of the dangerous operations of the crane in the area of the ladder.

By answer to the amended complaint, The Chesapeake and Ohio Railway Company denied ownership and control of the ladder, and further denied all allegations of negligence against it and asserted contributory negligence on the part of Koserkoff.

During the pendency of the suit, Koserkoff and American Steamship Company compromised and settled their suit; American Steamship Company paying to Koserkoff the sum of $1,928.00 on account of maintenance and cure, and the further sum of $7,500.00 as a compromise of any and all liability and/or claims which Koserkoff may have against American Steamship Company arising out of the accident of October 3, 1962.

The agreement between Koserkoff and American Steamship Company is set forth in the Respondent's Appendix.

Immediately prior to trial, The Chesapeake and Ohio Railway Company moved to amend its answer to include the foregoing payments as an affirmative defense. This motion was granted without objection.

The suit in the United States District Court for the Eastern District of Michigan, Southern Division was tried be-

fore The Honorable Thomas P. Thornton, United States District Judge, to a jury.

Although the amended complaint sounds both in general Admiralty and Maritime Law and Common Law Negligence as against The Chesapeake and Ohio Railway Company, the issue of Admiralty and Maritime Law was eliminated by the trial Court, and the case was tried on the issues of negligence and contributory negligence only.

At the conclusion of plaintiff's (petitioner herein) proofs. The Chesapeake and Ohio Railway Company moved for a directed verdict on the grounds that (1) no negligence had been proved against it, and (2) Koserkoff was guilty of contributory negligence as a matter of law on his part which barred any recovery. This motion was denied by the District Court.

At the conclusion of all the evidence in the case, The Chesapeake and Ohio Railway Company renewed its motion for a directed verdict on the same grounds, which motion was denied.

The case was submitted to a jury under instructions from the Court as to negligence and contributory negligence, and on March 14, 1969 a verdict was rendered in favor of Koserkoff and against The Chesapeake and Ohio Railway Company in the sum of $22,500.00.

On March 28, 1969, a judgment upon said verdict was entered by the District Court in favor of Koserkoff and against The Chesapeake and Ohio Railway Company in the sum of $22,500.00, together with interest and costs.

On April 4, 1969, the Chesapeake and Ohio Railway Company filed its motion to set aside the jury verdict and to enter judgment in its favor notwithstanding the verdict, together with its supporting brief, which motion was heard

on April 21, 1969 and taken under advisement by the District Court.

On July 3, 1969 the District Court entered an order denying defendant's (Respondent herein) motion for judgment notwithstanding the verdict.

On August 1, 1969 a notice of appeal by defendant was filed in the District Court. On the same date, a supersedeas bond in the amount of $25,000.00 was filed and an order entered thereon approving said bond and staying the proceedings.

After the record on appeal was filed and docketed in the United States Court of Appeals for the Sixth Circuit, Koserkoff, as appellee, filed a notice of cross-appeal on November 4, 1969, the said cross-appeal being limited to the question of interest on the judgment only.

The appeal came on for hearing before the United States Court of Appeals for the Sixth Circuit, and after oral arguments, the Court of Appeals reversed the District Court and remanded the cause to the District Court for entry of judgment for the defendant, and dismissed the cross-appeal.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on June 5, 1970.

Koserkoff, as appellee, timely petitioned for a re-hearing, which was denied by the Court of Appeals on September 10, 1970.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was then filed by Koserkoff in the Supreme Court of the United States.

STATEMENT OF FACTS

As applies to the parties to this petition, the petitioner is referred to as the plaintiff, and the respondent is referred to as the defendant.

(The page citations refer to the Appendix on Appeal in the United States Court of Appeals for the Sixth Circuit.)

This case arises out of an accident which happened on October 3, 1962 (50a) around 8:00 o'clock in the morning at Toledo, Ohio (51a). The plaintiff is Staphan L. Koserkoff of Toledo (43a-62a), who, upon the day of the accident, was an employee of American Steamship Company (50a) aboard a ship named Schoelkopf owned by American Steamship Company (50a). The defendant is The Chesapeake and Ohio Railway Company. The plaintiff suffered a personal injury and he claims the defendant is responsible therefor because of its negligence.

The plaintiff was born on June 29, 1889 (43a). On the day of the accident he was 73 years of age (65a).

The plaintiff had steady employment with American Steamship Company from 1951 through October 3, 1962 (65a) and had never worked for The Chesapeake and Ohio Railway Company (66a). Plaintiff was night porter or night cook on the S. S. Schoelkopf (66a). Plaintiff had been sailing on that ship for about four years preceding the date of the accident (50a).

On October 3, 1962 between 7:30 and 8:00 in the morning the S. S. Schoelkopf came into Toledo (50a) and berthed at the dock owned by The Chesapeake and Ohio Railway Company. The ship carried as part of its equipment metal

step ladders for the purpose of getting on and off the ship (51a). The distance from the dock to the deck of the ship was about 12 feet (51a). The ship watchman put the ladder over the side of the ship (51a-69a) with the foot of the ladder placed on the upper wall of the dock (71a), about a couple of feet higher than the sea wall (72a).

After the ship ladder was placed in position, at least five members of the ship's crew went down the ladder ahead of plaintiff (72a), three of whom made it to the dock (72a) and two others and plaintiff stepped from the ladder onto a loading crane owned by The Chesapeake and Ohio Railway Company which was on railroad tracks running alongside the wall of the dock and parallel to the ship. The crane was standing still (54a, 73a). Two of the crew members jumped from the crane to the ground, a distance of six to eight feet in height (72a). They were 25 to 30 years old (72a).

When plaintiff was on the ship deck, before getting on the ship ladder, the crane was at the foot of the ladder, standing still (54a).

The crane was stopped when plaintiff came down the ladder and stepped from the ladder onto the crane (54a). Koserkoff had descended three-fourths of the way down the ladder when he stepped onto the crane (52a).

Koserkoff followed the two crew members and jumped from the crane to the ground. The crane was stopped when Koserkoff made his jump (54a, 73a).

It was a bright, clear day and Koserkoff could see the dock area from the deck of the ship (75a).

When Koserkoff jumped from the crane to the ground he sustained a fracture of his right os calcis, the heel of his foot.

Koserkoff was familiar with the dock area, he having been on the S. S. Schoelkopf many times when the ship had docked at Toledo (68a, 69a). He knew that the railroad tracks ran alongside the dock and that the crane or coal rig was operated on the railroad tracks (69a).

The ship ladder was owned by American Steamship Company. No one from The Chesapeake and Ohio Railway Company had anything to do with the lowering and placing of the ship ladder (70a).

It is Mr. Koserkoff's claim that he jumped from the crane to the ground because he was scared (53a) and because the other two crew members jumped, so he had to jump with them (53a). However, Koserkoff was unable to state that anyone from The Chesapake and Ohio Railway Company ordered or directed him to jump from the crane (73a). He said that without any movement of the crane, he jumped six or eight feet to the ground (73a).

It was the further testimony of Koserkoff that he could see all right at that time of the morning (75a).

REASONS FOR DENYING THE WRIT

I.

There is no issue of Admiralty or Maritime Law involved in this case for the reason that the case was tried and submitted to the jury upon Common Law Negligence, under the following circumstances:

A. By understanding between the District Court and counsel before the commencement of the trial.

B. By plaintiff withdrawing his motion to reconsider the Court's ruling that Maritime Law did not apply in this case.

C. By plaintiff's failure to object to the Court's instruction to the jury on Common Law Negligence and contributory negligence to the exclusion of Maritime Law, as required by Rule 51 of the Federal Rules of Civil Procedure.

II.

The judgment of the Court of Appeals reversing the judgment of the District Court is not reviewable by this Court when the judgment of the Court of Appeals rests upon independent and adequate State grounds as to negligence, contributory negligence and proximate cause under the Common Law of that State.

III.

In a Common Law negligence action, where the testimony of a party plaintiff as to the occurrence of an accident is clear, direct, positive, credible and unequivocal, contrary evidence by plaintiff's witnesses as to the happening of an accident does not make a submissible jury question as to negligence of defendant or contributory negligence of plaintiff.

IV.

In a Common Law negligence action, where the defendant moves for a directed verdict at the conclusion of plaintiff's case and at the close of all the evidence on the grounds that, as a matter of law, no negligence had been proved against the defendant, and on the further grounds that, as a matter of law, the plaintiff was guilty of contributory negligence which barred recovery on his part, the Court of Appeals, upon consideration of a motion to set aside the jury verdict and for judgment notwithstanding the verdict made in the District Court, is entitled to cause

judgment to be given in accordance with the law as applied to the particular evidence and regardless of the nature of the verdict.

V.

The judgment of the Court of Appeals reversing the judgment of the District Court and remanding for entry of judgment for defendant, based upon a motion to set aside the jury verdict and for judgment notwithstanding the verdict, does not constitute a violation of the Seventh Amendment to the Constitution of the United States.

VI.

The Supreme Court of the United States will not grant a Writ of Certiorari merely to review the evidence or inferences drawn from it.

ARGUMENT

I.

THERE IS NO ISSUE OF ADMIRALTY OR MARITIME LAW INVOLVED IN THIS CASE FOR THE REASON THAT THE CASE WAS TRIED AND SUBMITTED TO THE JURY UPON COMMON LAW NEGLIGENCE.

A. By understanding between the District Court and counsel before the commencement of the trial.

At the conclusion of Plaintiff's case the Defendant moved for a directed verdict based upon the following grounds:

No. 1, No negligence has been proven against The Chesapeake and Ohio Railway Company.

No. 2, That the testimony in the case conclusively proves contributory negligence on the part of the Plaintiff.

During the argument of counsel on said motion, the following took place (Transcript 158, 159):

"Mr. Finn: Your Honor, I think this motion should be denied for two grounds:

One, of course, I think that there was no contributory negligence on the part of the plaintiff.

And secondly, this is a maritime case where comparative negligence should apply.

The Court: I don't know whether it is. That hasn't been determined yet.

I think that you ground your conclusion that it is a maritime case on the fact that—got that brief handy there?

Do you concede that this is a maritime case?

Mr. Kleinert: I certainly do not, your Honor. There is no proof of that. As a matter of fact, I

might say this, your Honor: it was my understand ing at the pretrial hearing or the conference in chambers that this case was to be tried as a common law negligence matter.

The Court: That is what I thought it was too."

B. By Plaintiff withdrawing his motion to reconsider the Court's ruling that Martitime Law did not apply in this case.

In the Petition for Writ of Certiorari, the Petitioner asserts on page 3 that "The case was tried under the Common Law for Negligence, over Plaintiff's objection."

Again on page 10, it is asserted by Petitioner that "At the trial, Plaintiff persisted in claiming that the cause was controlled by Maritime Law."

Both of these assertions are not in accordance with the record in the case.

At the conclusion of the case, and during the discussion on instructions to the jury, Plaintiff's counsel made a motion to reconsider the Court's ruling as to Maritime Law. Arguments were had thereon, at the conclusion of which Plaintiff withdrew his motion to reconsider the Court's ruling that Maritime Law did not apply in this case.

In Respondent's Appendix (Appendix H), there is set forth the complete transcript of that motion, arguments thereon, the Court's ruling and the withdrawal of said motion by Plaintiff's counsel.

In light of the foregoing it can hardly be asserted now that Plaintiff persisted in claiming that the cause was controlled by Maritime Law.

C. By Plaintiff's failure to object to the Court's instruction to the jury on Common Law Negligence and contributory negligence to the exclusion of Maritime Law, as required by Rule 51 of the Federal Rules of Civil Procedure.

The District Court's charge to the jury is set forth in its entirety in Respondent's Appendix (Appendix I). It is a charge on Common Law Negligence against Defendant, together with a charge that contributory negligence by Plaintiff would bar his recovery.

It is asserted by Petitioner that the charge to the jury was in error because it did not include Maritime Law.

It should be noted that the District Court's charge to the jury was made after Plaintiff had withdrawn his motion to reconsider the Court's ruling that Maritime Law did not apply in this case. In view of Plaintiff's withdrawal, how may it now be argued that the District Court was in error in not including Maritime Law? We submit that the Court's charge insofar as it excluded Martime Law, was proper in the circumstances.

Further, *Rule 51* of the *Federal Rules of Civil Procedure* provides, in part, as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

This, Plaintiff failed to do, and Plaintiff may not now complain of the charge to the jury which excluded any instruction as to Maritime Law.

II.

THE JUDGMENT OF THE COURT OF APPEALS REVERSING THE JUDGMENT OF THE DISTRICT COURT IS NOT REVIEWABLE BY THIS COURT WHEN THE JUDGMENT OF THE COURT OF APPEALS RESTS UPON INDEPENDENT AND ADEQUATE STATE GROUNDS AS TO NEGLIGENCE, CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSE UNDER THE COMMON LAW OF THAT STATE.

The allegedly tortious conduct of the railroad occurred at Toledo, Ohio, and the suit was commenced and tried in the United States District Court for the Eastern District of Michigan, Southern Division. The conflict of law rules of Michigan, the forum state, determines what substantive law will control. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 497 (1941); *Glen Falls Ins. Co. v. Danville Motors, Inc.*, 333 F (2) 187, 191 (6th Cir. 1964). Michigan holds that the substantive law of Ohio, the place of the tort, will be followed. *Petrusha v. Korinek*, 237 Mich. 583, 589 (1927).

III.

IN A COMMON LAW NEGLIGENCE ACTION WHERE THE TESTIMONY OF A PARTY PLAINTIFF AS TO THE OCCURRENCE OF AN ACCIDENT IS CLEAR, DIRECT, POSITIVE, CREDIBLE AND UNEQUIVOCAL, CONTRARY EVIDENCE BY PLAINTIFF'S WITNESSES AS TO THE HAPPENING OF AN ACCIDENT DOES NOT MAKE A SUBMISSIBLE JURY QUESTION AS TO NEGLIGENCE OF DEFENDANT OR CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.

Petitioner Koserkoff was the plaintiff in the District Court. Respondent herein was the defendant.

It is necessary to examine in detail the evidence in support of plaintiff's claim of negligence, the subject of contributory negligence and the issue of proximate cause.

We submit that the testimony of Koserkoff does not support the claims of negligence as charged in the amended complaint.

(The page citations refer to the Appendix on Appeal in the United States Court of Appeals for the Sixth Circuit.)

Mr. Koserkoff testified that on October 3, 1962 between 7:30 and 8:00 o'clock in the morning the S. S. Schoelkopf came into Toledo, Ohio (50a) and berthed at the dock owned by The Chesapeake and Ohio Railway Company. He said that the ship carried its own metal stepladders for the purpose of getting on and off the ship (51a). This completely negated his allegation that The Chesapeake and Ohio Railway Company owned and provided the ladder. He further testified that the ship watchman put the ladder over the side of the ship (50a, 60a) with the foot of the ladder placed on the upper wall of the dock, a couple of feet higher than the sea wall (71a, 72a). This eliminated the defendant from any handling of the ship ladder. He then testified that after the ship ladder was placed in position at least six members of the ship's crew went down the ladder ahead of plaintiff, three of whom made it to the dock (72a) and two others and Koserkoff stepped from the ladder onto the crane which was on railroad tracks running alongside the dock and parallel to the ship. Two young men jumped from the crane to the ground, a distance of six to eight feet (72a). Koserkoff followed and jumped to the ground because someone hollered at him and he became frightened, which caused him to jump. He sustained his injury from the jump.

It should be noted that Koserkoff testified that when the ship ladder was lowered, the crane was at the foot of the ladder standing still; the crane was standing still when Koserkoff began his descent; the crane was standing still

when he was about three-fourths of the way down; the crane was standing still when he stepped from the ladder onto the crane; and, the crane was standing still when he jumped from the crane to the ground. He could not identify anyone from The Chesapeake and Ohio Railway Company who ordered him to jump. In other words, all these actions on plaintiff's account were done without any direction or order from The Chesapeake and Ohio Railway Company.

There was no proof that the defendant gave any kind of orders or instructions to Koserkoff from the time he left the deck of the ship to the time he jumped to the ground.

Mr. Koserkoff further testified that he could plainly see at that time of day. This completely abolishes any claim of faulty illumination of the area.

So far as we can see, the testimony of Koserkoff is direct, positive, credible and unequivocal and does not connect The Chesapeake and Ohio Railway Company with any of his activities.

Plaintiff's own testimony as to the manner in which the accident is alleged to have happened is against his own interest. It is presumed to be true. *Barnett v. Terminal Railroad Association of St. Louis*, 228 F. 2d 756, 761.

The danger to Koserkoff was obvious and there was no evidence at all of any deception or distraction on the part of defendant.

Plaintiff, as a normal person, and familiar with the dock area, was charged with the duty of using his own faculties for his own protection in order to avoid injury and was required to make reasonable use of his sight, hearing and intelligence to discover any dangerous situation presented to him. *Dahlerup v. Grand Trunk Western Railroad Co.*, 319 Mich. 96, 100-101; 29 NW 2d 156.

There was no duty on the part of the defendant to warn Mr. Koserkoff of known or obvious dangers and no negligence therefore, in failing to do so. *38 Am. Jur., Negligence, Sec. 106.*

The Ohio Supreme Court has passed upon the subject of lack of warning of dangerous conditions. In the case of *Greyhound Lines v. Martin,* 127 Ohio State 499, 502, plaintiff brought an action against Greyhound Lines for injuries sustained when he was caused to slip and fall in the bus terminal, under the allegation that the fall was caused by an accumulation of soap on the terminal floor. Plaintiff alleged that Greyhound Lines had failed to warn him of any danger. At the conclusion of plaintiff's proofs and at the conclusion of all evidence, Greyhound moved for a directed verdict because of no actionable negligence. The court on page 502 stated:

> "One cannot complain of the lack of warning of conditions involving danger to himself when he has full knowledge of such conditions as if he had been apprised of them."

The Ohio Supreme Court said a directed verdict should have ben given on the grounds of no actionable negligence.

In *Atlantic Coast Line Railway Company v. Anderson,* 221 F. 2d 548, an action was brought under the Safety Appliance Act and the Federal Employer's Liability Act against the railroad for the death of a train crew conductor, who was directing the operation in which a refrigerator car failed to clear a switch and plaintiff was crushed against a moving car when a chain was pulled taut against him before he could unfasten the chain. One of the issues in the case was that the railroad had failed to warn the conductor of the danger in the operation. The court on page 533 stated:

> "There is not any duty to warn an employee of known or obvious dangers, and, therefore, negligence cannot be based on failure to do so."

The court further stated that the conductor's negligence was, as a matter of law, the sole proximate cause of the accident.

It is familiar law that if a person voluntarily exposes himself to a danger, he may not cast responsibility upon another for the consequences of such act. If in this case The Chesapeake and Ohio Railway Company could be found guilty of wrongdoing in placing its crane at a place which blocked the use of the ship's ladder as a way to the floor of the dock, such misconduct was quite apparent to plaintiff and his companions, and had come to rest as a causative agent before their choice of alternative routes of egress.

The Ohio Supreme Court in *Centrello v. Basky*, 164 Ohio St. 41, 48 (1955), quoted with approval the language of *Weber v. Eaton*, 160 F. (2) 577, 578 (CA D.C., 1947), as follows:

> "Contributory negligence and assumption of risk are so closely related as sometimes to be almost if not entirely, indistinguishable. In cases which do not arise between master and servant, the two terms may well be considered synonymous in the sense that *one who voluntarily places himself in a perilous position, when the potential danger is apparent*, is not exercising ordinary care for his own safety." (Emphasis supplied.)

In *Cadagan v. Great A. & P. Tea Co.*, 298 Mich. 207, 213 (1941), the Michigan Supreme Court quoted approvingly from *Stern v. Franklin*, 290 Mich. 467 (1939), the following syllabus:

> "One who voluntarily places himself in, or remains in, a position which he knows or with reasonable care should know, is dangerous, cannot recover for the ensuing injury."

The Court of Appeals was indeed correct in finding that this case was a case of pure accident. The real cause of his injuries was plaintiff's erroneous calculation that he could jump the same distance to the ground as had his companions. He failed to take into account his age and the likely brittleness of his bones. In *Modzel v. Norwalk Truck Lines*, 325 Mich. 693, 697, the court charged contributory negligence to a plaintiff who,

> "went into a place of obvious danger unnecessarily and without the proper regard that an ordinarily prudent man would have for his own safety."

In an attempt to bolster his case, plaintiff offered the testimony of Nancy Waxler and John Povey:

"Mr. Povey testified that he was a crew member on the same ship and that he was on the ship deck and saw Mr. Koserkoff getting on the ladder (83a). At that time he was about ten feet from the ladder walking toward the ladder (83a). He saw Mr. Koserkoff get on the ladder and descend about half way. At that point Mr. Povey's attention was distracted. He said he was leaning on the ladder and felt a bump on the ladder. He then looked down and saw a man, later identified as Koserkoff, flying through the air. He did not look like he was jumping. He further testified that he first saw the crane some 30 feet at the aft end of the ship from the ladder and that after he felt the bump on the ladder the crane was at the base of the ladder. Mr. Povey further said that he did not see the crane hit the ladder but he saw Mr. Koserkoff fall to the ground and that the ladder had been moved about two feet toward the bow of the ship (84a).

The only inference to be drawn from Mr. Povey's testimony is that the crane actually moved, hit the ladder while Koserkoff was descending and that he was caused to fall from the ladder to the ground. This testimony is diametrically opposed to the testimony of Mr. Koserkoff who stated that the crane did not move, it was unloading the ship at the time, and that the crane did not move from the time that the ladder was lowered until the time that Mr. Koserkoff jumped from the standing crane.

We now come to the testimony of Nancy Waxler. She said that the crane moved while Mr. Koserkoff was on the ladder but she did not know if the crane struck the ladder. She did say, however, that Mr. Koserkoff came off the ladder onto the crane and jumped to the ground. She did not hear any shouting before Mr. Koserkoff jumped. She did not see two men who jumped before Mr. Koserkoff.

If we analyze the testimony of Nancy Waxler, it is diametrically opposed to the testimony of plaintiff himself.

We submit that the testimony of Mr. Koserkoff as to the manner in which the accident is alleged to have happened was against his own interest and is presumed to be true. He was the one directly involved in the accident and should know better than anyone else as to how the accident happened. The testimony of Mr. Koserkoff as to the happening of the accident was direct, positive, credible and unequivocal that the crane was in a stationary position all during the activities of plaintiff. The testimony of Mr. Povey and Mrs. Waxler is entirely based upon circumstantial evidence in the form of an inference and is of doubtful value. Under such circumstances the direct testimony of Mr. Koserkoff is not destroyed and there was nothing to be submitted to the jury. *Gillett v. Michigan United Traction Company*, 205 Mich. 410, 416.

Presumptions created by inference cannot be weighed against direct evidence for they fade out in the light of evidence, no matter how contradictory the evidence. Where there is direct evidence a presumption may not be used to destroy the direct evidence. *Heckler v. Laing*, 300 Mich. 139, 146 and cases cited; *Ortega v. Lenderink*, 382 Mich. 218, 222-224 (1969); cf. *Connor v. Lake Shore & M.S.R. Co.*, 168 Mich.. 29 (1911); *Stein v. General Necessities Corp.*, 232 Mich. 322, 329 (1925); *Barnett v. Terminal Railroad Association of St. Louis*, 228 F(2) 756, 761 (8th Cir. 1956).

IV.

IN A COMMON LAW NEGLIGENCE ACTION WHERE THE DEFENDANT MOVES FOR A DIRECTED VERDICT AT THE CONCLUSION OF PLAINTIFF'S CASE AND AT THE CLOSE OF ALL THE EVIDENCE ON THE GROUNDS THAT, AS A MATTER OF LAW, NO NEGLIGENCE HAD BEEN PROVED AGAINST THE DEFENDANT, AND ON THE FURTHER GROUNDS THAT, AS A MATTER OF LAW, THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH BARRED RECOVERY ON HIS PART, THE COURT OF APPEALS, UPON CONSIDERATION OF A MOTION TO SET ASIDE THE JURY VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT MADE IN THE DISTRICT COURT IS ENTITLED TO CAUSE JUDGMENT TO BE GIVEN IN ACCORDANCE WITH THE LAW AS APPLIED TO THE PARTICULAR EVIDENCE AND REGARDLESS OF THE NATURE OF THE VERDICT.

In the instant case, there is no dispute that defendant moved for a directed verdict at the conclusion of plaintiff's case; the defendant renewed the motion for directed verdict at the close of all the evidence, both of which motions were denied by the District Court. After jury verdict and after entry of judgment for plaintiff on said jury verdict, the defendant timely filed its motion in the District

Court to set aside the jury verdict and for judgment in its favor notwithstanding the verdict.

Neither the defendant nor the plaintiff ever filed a motion for a new trial in the District Court.

In the Court of Appeals, the plaintiff did not move for a new trial.

It is the contention of the respondent herein (defendant below) that the Court of Appeals has the power itself to order dismissal or direct entry of judgment for the defendant based upon its motion n.o.v.

In the case of *Neely v. Martin K. Eby Construction Co.* (1967), 87 S. Ct. 1072, 386 U.S. 317, 18 L. Ed. 2d 75, that precise question was presented to the United States Supreme Court.

In that case the Supreme Court said:

> "The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v. * * *. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n.o.v on appeal. Section 2106 of Title 28 provides that,
>
> > 'The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for

> review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.'
>
> See *Bryan v. United States*, 338 U.S. 552, 70 S. Ct. 317, 34 L. Ed. 335."

V.

THE JUDGMENT OF THE COURT OF APPEALS REVERSING THE JUDGMENT OF THE DISTRICT COURT AND REMANDING FOR ENTRY OF JUDGMENT FOR DEFENDANT, BASED UPON A MOTION TO SET ASIDE THE JURY VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, DOES NOT CONSTITUTE A VIOLATION OF THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The petition for writ of certiorari and the petition for rehearing before the Court of Appeals suggest that petitioner has been deprived of a trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States.

The defendant's motion for judgment n.o.v. was made under Rule 50(b) of the Federal Rules of Civil Procedure.

That Rule does not violate the Seventh Amendment's guarantee of a jury trial. *Neely v. Martin K. Eby Construction Co., supra*, wherein the Court said:

> "Under Rule 50(b), if a party moves for a directed verdict at the close of the evidence and if the trial judge elects to send the case to the jury, the judge is 'deemed' to have reserved decision on the motion. If the jury returns a contrary verdict, the party may within 10 days move to have judgment entered in accordance with his motion for directed verdict. This procedure is consistent with

decisions of this Court rendered prior to the adoption of the Federal Rules in 1938. Compare *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, with *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879, and *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177. And it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147."

VI.

THE SUPREME COURT OF THE UNITED STATES WILL NOT GRANT A WRIT OF CERTIORARI MERELY TO REVIEW THE EVIDENCE OR INFERENCES DRAWN FROM IT.

Petitioner asserts many instances in which it is claimed that the Court of Appeals substituted its inferences and findings of fact from the testimony offered in the case, which were not in accordance with the District Court.

It would appear from the petition that petitioner, is asking the Supreme Court to make different findings of fact and inferences contrary to those made by the Court of Appeals in its opinion.

First, let us say that the opinion of the Court of Appeals was a unanimous one.

Secondly, on a petition for Writ of Certiorari to a Court of Appeals, the Supreme Court does not review the evidence and discuss specific facts. *U. S. v. Johnston* (1925), 45 S. Ct. 496, 268 U.S. 220, 69 L. Ed. 925. See also: *Boehmer v. Pennsylvania R. Co.* (1920), 40 S. Ct. 409, 252 U.S. 496, 64 L. Ed. 680.

COMMENTS ON SETTLEMENT AGREEMENT BETWEEN KOSERKOFF AND AMERICAN STEAMSHIP COMPANY

At the trial in the District Court, both plaintiff and defendant offered in evidence the Settlement Agreement between Koserkoff and American Steamship Company (Appendix D, pages 10 A 17 A).

To correct any misunderstanding, the recital in the Settlement Agreement on page 11 A refers to a Cross Complaint by American Steamship Company against The Chesapeake and Ohio Railway Company. This is not true. None was ever filed.

On page 14 A of the Appendix, reference is again made to American Steamship Company's claim against the Chesapeake and Ohio Railway Company for indemnity. This is not true. No such claim for indemnity was a part of this lawsuit.

On pages 12a and 13a of the Appendix, reference is made to the claim of Koserkoff against American Steamship Company for maintenance and cure, and claims for indemnity damages under The Jones Act and under the General Maritime Law for breach of the warranty of unseaworthiness, but expressly reserving any and all rights and causes of action which Koserkoff has or may have against The Chesapeake and Ohio Railway Company by reason of injuries sustained by him on October 3, 1962 at Toledo, Ohio and which were caused by the negligence and faults of the said Chesapeake and Ohio Railway Company.

It seems to the writer of this brief that by the terms of the Settlement Agreement Koserkoff recognized that his cause of action against American Steamship Company was

based upon Admiralty Law; while, his claim against the Railway Company was based upon Common Law Negligence.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. STRAUB
Room 407—One Northland Plaza
20755 Greenfield Road
Southfield, Michigan 48075

WALTER A. KLEINERT
2964 Penobscot Building
Detroit, Michigan 48226
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that copies hereof were mailed to Victor G. Hanson, 15929 West Seven Mile Road, Detroit, Michigan 48325, and to Arthur Roth, 1111 Ainsley Building, Miami, Florida 33132, Counsel for Petitioner.

/s/ Walter A. Kleinert

RESPONDENT'S APPENDIX

APPENDIX A

FEDERAL RULES OF CIVIL PROCEDURE

Rule 50(b)

Rule 50(b). Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

APPENDIX B

FEDERAL RULES OF CIVIL PROCCEDURE

Rule 51

Rule 51. Instructions to Jury: Objections. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

APPENDIX C

ANSWER OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY TO AMENDED COMPLAINT

In The

DISTRICT COURT OF THE UNITED STATES

for the Eastern District of Michigan
Southern Division

Civil Action No. 25192

Staphan L. Koserkoff,
521 Chapin Street, Toledo, Ohio,
Plaintiff,
vs.
American Steamship Company,
A Corporation,
and
The Chesapeake and Ohio Railway Company,
A Virginia Corporation,
Defendants.

The defendant says:

For a First Cause of Action

1. Upon information and belief only, this defendant admits the allegations contained in paragraph First of the Amended Complaint.

2. Upon information and belief only, this defendant admits the allegations contained in paragraph Second of the Amended Complaint.

3. Upon information and belief only, this defendant admits the allegations contained in paragraph Third of the Amended Complaint. Further answering, this defendant denies that plaintiff was at any time in the employ of The Chesapeake and Ohio Railway Company.

4. Answering paragraph Fourth of the Amended Complaint, this defendant is without knowledge or information sufficient to form a belief as to the allegations therein contained and leaves plaintiff to his proper proofs.

5. Upon information and belief only, this defendant admits that plaintiff, while debarking from the Str. Schoelkopf at The Chesapeake and Ohio Company dock at Toledo, Ohio, at about 9:35 A.M. on October 3, 1962, climbed onto a portion of the dock crane rig as it approached the vessel's boarding ladder, as alleged in the Amended Complaint, and later jumped to the dock from the unloading rig, suffering some injury, but this defendant denies each and every other allegation contained in paragraph Fifth of said Amended Complaint.

6. Answering paragraph Sixth of the Amended Complaint, this defendant admits that it has failed and refused to pay any monies to the plaintiff as a result of said injury and affirmatively alleges that it is not obligated so to do for the reason that plaintiff was not in the employ of The Chesapeake & Ohio Railway Company, and for the further reason that this defendant was not guilty of any negligence in the premises.

7. This defendant denies each and every allegation contained in paragraph Seventh of the Amended Complaint, including subdivisions (A) through (G), all inclusive.

8. Answering paragraph Eighth of the Amended Complaint, this defendant is without knowledge or informa-

tion sufficient to form a belief as to the injuries alleged to have been suffered by plaintiff, and, therefore, denies the same, leaving plaintiff to his proper proofs. Further answering, this defendant denies that any such injuries as alleged were caused or contributed to on the part of this defendant.

Wherefore, this defendant denies that plaintiff is entitled to any judgment against this defendant as alleged under the First Cause of Action.

For a Second Cause of Action

9. This defendant repeats and re-alleges all the admissions and denials hereinbefore set forth in the First Cause of Action with the same force and effect as though pleaded herein in full, the same being incorporated herein by reference.

10. Answering paragraph Tenth of the Amended Complaint, this defendant denies each and every allegation therein contained, and specifically alleges that it is not subject to the General Admiralty and Maritime Laws of the United States.

11. This defendant makes no answer to the allegations set forth in paragraph Eleventh of the Amended Complaint for the reason that such allegations are directed to The American Steamship Company, and for the further reason that this defendant was not the owner of the vessel involved in the within cause of action.

Wherefore, this defendant denies that plaintiff is entitled to any judgment against it under the Second Cause of Action set forth in the Amended Complaint.

For a Third Cause of Action

12. This defendant repeats and re-alleges all the admisions and denials herein set forth in the First Cause of Action with the same force and effect as though pleaded herein in full.

13. This defendant denies each and every allegation contained in paragraph Thirteenth of the Amended Com plaint and affirmatively alleges that plaintiff was not an employee of this defendant and that there is no duty on the part of this defendant to provide the plaintiff with the expenses of his maintenance and cure.

14. This defendant is without knowledge or information sufficient to form a belief as to the allegations set forth in paragraph Fourteenth of the Amended Complaint, and affirmatively alleges that it is not liable for maintenance and cure of the plaintiff.

Wherefore, this defendant denies that plaintiff is entitled to recover any sum by way of judgment against this defendant under the allegations set forth in the Third Cause of Action.

For a Fourth Cause of Action

15. The allegations set forth in paragraph First of the Fourth Cause of Action are admitted.

16. As to paragraph Second this defendant admits only that it maintains and controls a dock at Toledo, Ohio; it has no knowledge or information to form a belief as to the matters set forth respecting employment by American Steamship Company and leaves said plaintiff to his proofs. Further answering, this defendant denies that said plaintiff was at anytime an employee of the Chesapeake and Ohio Railway Company.

17. This defendant admits that at the time and place stated in paragraph Third, the S.S. J.F. Schoelkopf, Jr. was berthed at said dock at Toledo, Ohio, but this defendant denies that it provided a ladder for plaintiff's use in leaving said vessel and alleges to the contrary that the ladder referred to in said Amended Complaint was owned and provided by plaintiff's employer, The American Steamship Company, and was not in any respect subject to any supervision or control by this defendant. This defendant denies that the loading crane was suddenly and unexpectedly moved in front of said ladder and alleges that the crane was not in motion at all when plaintiff jumped and was injured, and, said crane not being in motion no warnings were necessary. This defendant denies that it was at all necessary or proper for plaintiff to climb over and upon the crane to get to a place of safety and to avoid injury, and alleges to the contrary that the plaintiff was in a place of safety while he was on said ladder, and that he was in a position to observe and know all of the conditions then and there existing, and, that at a time when the crane was completely stationary, said plaintiff undertook to disembark from said vessel by climbing over said crane and jumping from it to the ground. Further answering, this defendant denies the remaining allegations therein set forth in paragraph Third of said Amended Complaint.

18. Answering paragraph Fourth, this defendant alleges that said plaintiff was not an employee of this defendant; it further denies that any General Admiralty and Maritime Law applies to this defendant in the circumstances. Further, this defendant denies each and every allegation therein set forth.

19. This defendant denies each and every allegation therein set forth in paragraph Fifth of the Amended Com-

plaint, including subparagraphs (A) through (D), all inclusive.

20. Answering paragraph Sixth, this defendant is without knowledge or information sufficient to form a belief as to the injuries, if any, allegedly sustained by plaintiff, and, therefore leaves plaintiff to his proper proofs; it further denies that plaintiff suffered any such injuries as alleged, by reasons of acts of negligence on the part of this defendant.

21. Answering said Amended Complaint in its entirety, this defendant specifically denies each and every allegation therein contained which is not by this Answer specifically admitted to be true.

Affirmative Defenses

22. That the plaintiff at no time was an employee of this defendant.

23. That the sole proximate cause of plaintiff's injuries, if any, was his own negligence in that he was a trespasser upon this defendant's loading crane at a time when the crane was not in motion and when he had a clear, unobstructed view of the area involved.

24. That the sole proximate cause of plaintiff's injuries, if any, was the negligence of the plaintiff in carelessly and negligently jumping from the crane to the ground and thereby sustaining the injuries complained of.

25. That plaintiff's actions aforesaid contributed to the accident and injuries complained of in said Amended Complaint.

Wherefore, this defendant denies that plaintiff is entitled to any relief as prayed for under his Fourth Cause of Action and demands a judgment in favor of said defendant and against said plaintiff, together with costs.

/s/ Walter A. Kleinert
Attorney for The Chesapeake & Ohio Railway Company
2964 Penobscot Building
Detroit, Michigan 48226
Phone: 963-2300

/s/ Robert A. Straub
Attorney for The Chesapeake & Ohio Railway Company
Law Department
6-114 General Motors Building
Detroit, Michigan 48202
Phone: 962-8300

APPENDIX D

AGREEMENT BETWEEN STAPHAN L. KOSERKOFF AND AMERICAN STEAMSHIP COMPANY

Whereas, Staphan L. Koserkoff, residing at 521 Chapin Street, Toledo, Ohio, sustained certain personal injuries while disembarking from the Steamer J. F. Schoellkopf, Jr., at Toledo, Ohio on the 3rd day of October, 1962 when he was either struck by a leg of a moving dockside loading crane or jumped from the ship's boarding ladder to avoid being struck by the crane leg, and

Whereas, Staphan L. Koserkoff was at the time employed as a seaman and member of the crew of the Steamer J. F. Schoellkopf, Jr., a merchant vessel owned by American Steamhip Company, and

Whereas, Staphan L. Koserkoff, by and through his attorney, has filed an action in the United States District Court for the Eastern District of Michigan, Southern Division, being Civil Action No. 25192, against American Steamship Company and the Chesapeake & Ohio Railway Company claiming damages in the total sum of Four Hundred Fifty Thousand ($450,000.00) Dollars and in which he seeks recovery against American Steamship Company under the provisions of the Merchant Marine Act of 1920 (commonly known as the Jones Act, 46 U.S.C. 688) for negligence, the General Maritime Law for unseaworthiness, and for maintenance and cure, and in which he also seeks recovery against the Chesapeake & Ohio Railway Company for its negligence in the operation of its dock loading crane, and

Whereas, American Steamship Company has appeared in said action and denied that it or its agents, servants or employees were guilty of any fault, negligence or wrong doing which caused or contributed to the injuries sustained by Koserkoff and has specifically denied the alleged unseaworthiness of the Steamer J. F. Schoellkopf, Jr., and

Whereas, American Steamship Company may be found liable to Stephan L. Koserkoff by reason of a breach of some nondelegable duty imposed upon it by law, without regard to active negligence, fault or wrong doing on the part of American Steamship Company, and

Whereas, pursuant to the Admiralty and Maritime Doctrines of maintenance and cure, American Steamship Company is, or may be, liable to Stephan L. Koserkoff for damages irrespective of any fault or wrong doing on the part of American Steamship Company, or its agents, servants or employees, and

Whereas, American Steamship Company has filed a cross complaint against the Chesapeake & Ohio Railway Company in the aforementioned action seeking recovery over against Chesapeake & Ohio Railway for sums which it has paid to Koserkoff for maintenance and cure and for any sums which it may be required to pay to him in the future on account of maintenance and cure and/or for damages for breach of the warranty of seaworthiness or otherwise, by reason of the substandard performance of the Chesapeake & Ohio Railway Company of its obligation to load the Steamer J. F. Schoellkopf, Jr. in a safe and seamanlike manner in accordance with the duties and obligations imposed upon it by the General Maritime Law, and

Whereas, American Steamship Company has heretofore paid the sum of $1,928.00 to Stephan L. Koserkoff on account of maintenance, and

Whereas, American Steamship Company and Staphan L. Koserkoff are desirous of compromising and settling the matters in dispute between them.

Now, therefore, it is mutually agreed between American Steamship Company and Staphan L. Koserkoff, his heirs, administrators, executors and assigns, and Victor G. Hanson, his attorney that:

1) American Steamship Company agrees to pay to Staphan L. Koserkoff and to Victor G. Hanson, his attorney, and Staphan L. Koserkoff and Victor G. Hanson agree to accept the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, lawful money of the United States, in addition to One Thousand Nine Hundred Twenty-Eight ($1,928.00) Dollars heretofore paid to Staphan L. Koserkoff on the terms and conditions hereinafter set forth.

2) For and in consideration of the said sum of Seven Thousand Five Hundred ($7,500.00) Dollars to him in hand paid and receipt whereof is hereby acknowledged (in addition to the sum of $1,928.00 previously paid to him), by American Steamship Company, Staphan L. Koserkoff, for himself, his heirs, administrators, executors and assigns, hereby agrees to dismiss with prejudice to him, Civil Action No. 25192 in the United States District Court for the Eastern District of Michigan, Southern Division, insofar as the same is directed against American Steamship Company, and hereby covenants and agrees not to sue American Steamship Company, the Steamer J. F. Schoellkopf, Jr., her owners, underwriters, master and crew, for any and all liability and/or claims which he may have by reason of, or growing out of the accident sustained by him at Toledo, Ohio on October 3rd, 1962 while he was employed as a seaman and member of the crew of the Steamer J. F. Schoellkopf, Jr., including, but not limited to, his claims

for maintenance and cure and his claims for indemnity damages under the Jones Act and under the General Maritime Law for breach of the warranty of unseaworthiness, but expressly reserving any and all rights and causes of action which the said Stephan L. Koserkoff has or may have against the Chesapeake & Ohio Railway Company by reason of the injuries sustained by him on October 3, 1952 at Toledo, Ohio and which were caused by the negligence and faults of the said Chesapeake & Ohio Railway Company.

3) That American Steamship Company will not further participate in Civil Action No. 25132 aforesaid except that its records and the contents of its files will be available to Stephan L. Koserkoff and Victor G. Hanson, his attorney, for use in the continuation of said action against the Chesapeake & Ohio Railway Company.

4) Stephan L. Koserkoff for himself, his heirs, administrators, executors and assigns, further covenants that no settlement or loan or payment or arrangement of any kind or nature has been made by him or on his behalf with Chesapeake & Ohio Railway Company or any other person or firms which may be liable to him for the injuries sustained by him.

5) Stephan L. Koserkoff for himself, his heirs, administrators, executors and assigns, further agrees to prosecute diligently his action against the Chesapeake & Ohio Railway Company and agrees not to dismiss or in any way compromise or settle his claim against the Chesapeake & Ohio Railway Company without prior written consent of American Steamship Company.

6) In the event that Stephan L. Koserkoff is successful in his action against the Chesapeake & Ohio Railway

Company either by way of satisfaction of judgment entered upon conclusion of litigation or a settlement, it is hereby agreed between the parties as follows:

a) In the event Staphan L. Koserkoff recovers less than $25,000.00 from the Chesapeake & Ohio Railway Company, Staphan L. Koserkoff shall keep the money herewith paid to him by American Steamship Company and there shall be no further obligation or liability between American Steamship Company and Staphan L. Koserkoff for anything.

b) In the event that Staphan L. Koserkoff shall recover more than $25,000.00 and less than $32,500.00 from the Chesapeake & Ohio Railway Company, such sums of money as exceed the sum of $25,000.00 shall be paid by Staphan L. Koserkoff to American Steamship Company as reimbursement for the monies herewith paid by American Steamship Company to Koserkoff and in recognition of the fact that said monies were paid by American Steamship Company without admission of liability and in further recognition of American Steamship Company's claim against the Chesapeake & Ohio Railway Company for indemnity.

c) In the event that Staphan L. Koserkoff recovers more than $32,500.00 from the Chesapeake & Ohio Railway Company, Staphan L. Koserkoff will pay to American Steamship Company the sum of $7,500.00 in recognition of the fact that said monies were paid by American Steamship Company without admission of liability and in further recognition of American Steamhip Company's claim against the Chesapeake & Ohio Railway Company for indemnity and Staphan L. Koserkoff shall keep and retain all monies in excess

of the $7,500.00 so returned to American Steamship Company.

7) It is further agreed by and between the parties hereto that in the event of any recovery by Stephan L. Koverhoff against the Chesapeake & Ohio Railway Company, Victor G. Hanson shall deposit such monies in a recognized banking institution in the City of Detroit as Trustee for Stephan L. Koverhoff and American Steamship Company and any and all funds so recovered shall be so retained until such time as any claim which has been, or may be, asserted by the Chesapeake & Ohio Railway Company against American Steamship Company for contribution or otherwise is finally adjudicated or otherwise determined, including any and all appeals. In the event that American Steamship Company is ordered to pay any sums of money to the Chesapeake & Ohio Railway Company by way of contribution or otherwise, then any such sums in excess of $7,500.00 which American Steamship Company is ordered to pay to the Chesapeake & Ohio Railway Company, will be deducted from the recovery received by Stephan L. Koverhoff against the Chesapeake & Ohio Railway Company and will be remitted to American Steamship Company.

8) It is understood and agreed between the parties hereto that it is the intention of the parties to this Agreement to guarantee to insure Stephan L. Koverhoff and Victotr G. Hanson, his attorney, a gross recovery in the minimum sum of $7,500.00 (in addition to $1923.00 previously paid to Stephan L. Koverhoff on account of maintenance) regardless of the outcome of the action against the Chesapeake & Ohio Railway Company and that the maximum liability of American Steamship Company for any reason shall not exceed the sum of $7,500.00.

9) Wherever the term "Chesapeake & Ohio Railway Company" is used in this agreement, said term shall be deemed to include any and all parent or subsidiary corporations, their respective successors and assigns or other individual partnerships or corporations legally liable to Stephan L. Koverkoff for the injuries sustained by him as aforesaid.

10) This Agreement shall inure to and be binding upon the heirs, administrators, executors, successors and assigns of the parties to this agreement.

/s/ Stephan L. Koverkoff
/s/ Victor G. Hanson, Esq:
American Steamship Company
Thomas N. Burke
Its Senior Vice President

State of Ohio,
County of Lucas—ss.

On this 6th day of February, 1968, before me, personally came Stephan L. Koverkoff, to me known and known to me to be the same person described in and who executed the foregoing Agreement, and he duly acknowledged to me that he executed the same.

/s/ C. E. Irmen
Notary Public, Lucas County, Ohio.
My commission expires January 12, 1972.

State of Michigan,
County of Wayne—ss.

On this 8th day of February, 1968, before me, personally came Victor G. Hanson, to me known and known to me to be the same person described in and who executed the foregoing Agreement, and he duly acknowledged to me that he executed the same.

/s/ Laura E. Udell,
Notary Public, Wayne County, Michigan.
My commission expires February 19, 1968.

State of New York,
County of Erie—ss

On this 9th day of February, 1968 before me personally came Thomas W. Burke to me personally known, who, being by me duly sworn, did depose and say that he resides in Snyder, N. Y., that he is the Senior Vice President of American Steamship Company, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

Fenton F. Harrison,
Notary Public, State of New York, Qualified in Erie County.
My commission expires March 30, 1969.
Reg. No. 4831.

APPENDIX E

STIPULATION AND ORDER OF DISMISSAL AS TO AMERICAN STEAMSHIP COMPANY WITH PREJUDICE AND WITHOUT COSTS

In The
DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Michigan
Southern Division

Civil Action No. 25192

Staphan L. Koserkoff,
Plaintiff,
vs.
American Steamship Company
A Corporation
and
The Chesapeake and Ohio Railway Company,
A Virginia Corporation,
Defendants.

ORDER FOR DISMISSAL

At a session of the above named Court, held in the Federal Building, City of Detroit, County of Wayne and State of Michigan, on February 23, 1968.

Present: Honorable Thomas P. Thornton, U.S. District Judge.

On reading and filing the annexed stipulation and the Court being fully advised in the matter,

It is Hereby Ordered that the above entitled cause as to the defendant, American Steamship Company, be dismissed with prejudice to the defendant, American Steamship Company, and without costs to either party and that said action continue against the defendant, The Chesapeake and Ohio Railway Company.

Thomas P. Thornton,
District Judge.

Dated: February 23, 1968.

STIPULATION FOR DISMISSAL

It is Hereby Stipulated by and between the attorneys for the plaintiff, Staphan L. Koserkoff, and the defendant, American Steamship Company, that this action be dismissed with prejudice as to the defendant, American Steamship Company, and without costs to either party and that said action continue against the defendant, The Chesapeake and Ohio Railway Company.

/s/ Victor G. Hanson,
Attorney for Plaintiff
15929 Seven Mile Road
Detroit, Michigan 48235
Coffey, Heffernan & Harrison
and
Foster, Meadows & Ballard
By: /s/ John Arthur Hamilton
Attorneys for Defendant
American Steamship Company
3266 Penobscot Building
Detroit, Michigan 48226

APPENDIX F

MOTION BY THE CHESAPEAKE AND OHIO RAILWAY COMPANY FOR LEAVE TO AMEND ITS ANSWER

In The
DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Michigan
Southern Division

Civil Action No. 25192

Staphan L. Koserkoff
Plaintiff

vs.

The Chesapeake and Ohio Railway Company,
a Virginia Corporation
Defendant.

Now comes The Chesapeake and Ohio Railway Company, defendant herein, and moves this Court that it be permitted to amend its answer to plaintiff's amended complaint in the following particulars:

Special Defenses

1. That plaintiff Koserkoff received from American Steamship Company, formerly a defendant herein, the sum of $1,928.00 on account of maintenance and cure.

2. That plaintiff Koserkoff received from American Steamship Company, formerly a defendant herein, the further sum of $7,500.00.

3. That said sums aforesaid totaling $9,428.00 had been paid by American Steamship Company and received by Koserkoff in consideration of a covenant not to sue American Steamship Company in full compensation for the injuries and damages allegedly sustained by Koserkoff or in mitigation of any injuries and damages that might be recovered against The Chesapeake and Ohio Railway Company for the injuries occurred at Toledo, Ohio on October 3, 1962.

/s/ Walter A. Kleinert
Attorney for Defendant
2964 Penobscot Building
Detroit, Michigan 48226
Telephone: 963-2300

APPENDIX G

ORDER GRANTING MOTION TO AMEND ANSWER OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY

In The
DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Michigan
Southern Division

Civil Action No. 25192

Staphan L. Koserkoff,
Plaintiff,

vs.

The Chesapeake and Ohio Railway Company,
a Virginia Corporation,
Defendant.

The Court: . . . . So, the agreement of settlement and the amount of settlement will be disclosed to the jury and on the basis of that arrangement, the defendant, the Chesapeake & Ohio Railway Company, has submitted a written motion for leave to amend its answer to include special defenses which, in part, set out the amounts that have to do with the settlement.

And I am going to grant the motion to amend. So, I will file this motion.

• • • • •

APPENDIX H

PLAINTIFF'S MOTION TO RECONSIDER THE COURT'S RULING THAT MARITIME LAW DID NOT APPLY IN THE CASE, AND WITHDRAWAL OF SAID MOTION

The Court: You said you have a motion?

Mr. Finn: I have a motion. I'd like to ask the Court to reconsider its ruling granting Mr. Kleinert's motion that Maritime Law has no effect here, because I have a transcript now of testimony of the plaintiff.

On page 14 of the testimony, the fourth line from the bottom, there was a question:

> "Q. Was there a lot of noise around there?
> A. Yes. They just started loading there."

Then on page 16 the question was:

> "Q. Was the crane at the ladder . . . when you were on deck before you got on that ladder or was the crane, if you know?
> A. Well, the crane, they just started loading.
> Q. Had the crane been moving?
> A. No. Just started loading, stand still."

The Court: Whose testimony are you reading?

Mr. Finn: Of Mr. Koserkoff, your Honor, on page 14 and 16.

On page 14 it is the fourth line from the bottom. It is the question.

The Court: On page 14:

> "Q. Was there a lot of noise around there?
> A. Yes. They just started loading there."

Where is the other?

Mr. Finn: On page 16, your Honor, at the top and the first question and answer and the second question and answer.

The Court: Yes.

Mr. Finn: Your Honor, that is conjunction with answer number two to the Interrogatories filed by the defendant. And the question is: "22. Please state in detail exactly what work was being performed by the crane at the Chesapeake & Ohio Railway Company dock at Toledo, Ohio at or about 7:30 A.M., on October 3, 1962."

And the answer to number 22 is:

"At the time of the accident the crane or coal rig was not performing any service, it was getting the equipment in position to dump coal later into the SS J. F. Schoedkopf Jr."

It is our contention, your Honor, that this testimony, in conjunction with that of the plaintiff, is admission in conjunction of the plaintiff that this actually was part of the ship at this time and, therefore, under the Maritime jurisdiction.

The Court: Well, I tell you—

Go ahead. What do you think?

Mr. Kleinert: Well, number one, at our pretrial conference just before the trial, it was my understanding that this matter was to be tried on the basis of common law negligence — that is number one — and I think the stipulation was made on the record to that effect.

Now, number two, in answer to an interrogatory that it was just there and later on was going to do some loading coal, that probably would be true later on. But I don't think that the equipment was placed there for the purpose of loading it at some later time would constitute Maritime, nor do I think the question—Koserkoff saying that it was,

he "heard a lot of noise," it was loading—necessarily makes it Maritime.

Mr. Finn: I would like to call your Honor's attention, first—

Mr. Kleinert: If you are true, Jim, and you want to place this on the basis of Maritime, then its my position that I am entitled to an instruction that this release in the C & O became in conjunction with that ship, then the question—then your settlement and your release constitutes a discharge of the C & O.

Mr. Finn: I am willing to take that gamble, of course.

This is the third or fourth time you recalled the common law negligence. I don't remember it.

The Court: I remember we discussed it because I was—I had, at that time hadn't seen, naturally, requests to charge, but the count, itself, is set up pretty well as a negligence count.

Mr. Finn: I think it includes Maritime, your Honor. We specifically set it out.

The Court: Here is the way I feel about it: If your position is that the crane was loading at the time that your client came down the ladder, then I would think I would have to find as a matter of law that the boat, itself the watchman and your client were guilty of contributory negligence, because now you are telling us that that ladder was installed while the crane was unloading and that here's a man that came down right into position where he had to get off the ladder and get on the crane and then jump up from there to get down onto the ground.

So, cripes, if that isn't legally contributory negligence, I haven't heard of it.

Mr. Finn: Of course, that is not my contention.

The Court: Your contention is this: You are in here telling me, from the record, that your client said in two

places that the crane was operating, and I am telling you if that is what you want that you have got to agree that the crane was stationary and that the ladder was installed at the time when the crane was operating and your man came down the ladder to get off it when he had to get on the crane. So, as far as I am concerned, if that is what your position is and that is what you want the Court to do,then I will entertain a motion for judgment for no cause for action on the ground that he is guilty of contributory negligence as a matter of law. I can't figure any other way to it because what you are saying now is that he stepped right into this trouble in spite of the fact that you have got Povey's testimony that he saw it 30 feet away and it came up, hit it. You have got the daughter's testimony that it was moving and you have got his testimony, now.

Mr. Finn: Your Honor, I don't want to belabor the point. I thought perhaps the Court would entertain this motion.

The Court: I will entertain it and if you want to insist on it, it's a quick way to wind up the lawsuit.

Mr. Finn: Especially in light of

The Court: I don't know how I could do otherwise.

Mr. Finn: In that case, your Honor, I will draw back on my statements.

The Court: What else have you got?

I will deny your motion. You are withdrawing, which takes care of it.

Anything else?

Mr. Finn: No. That is all, your Honor.

APPENDIX I

THE DISTRICT COURT'S CHARGE TO THE JURY

The Court: In view of the closing statement, the function of a jury is to administer justice regardless of who is concerned with it, and I don't think that you should pick out any one person in the litigation and say "I have got to do justice for that person."

What you have got to do is do justice to your oath, and regardless of how it may affect anybody, if you do just that, then you are performing as a juror should.

You, as jurors, are the sole judges of the facts in this case. The Court has not intended by reason of anything he may have said or done during the trial of this case, to express any opinion upon the facts.

On the other hand, the Court is the sole judge of the law in the case and it is your duty to accept and apply the law as it is given you by the Court, regardless of whether you feel the law is good or bad. This case must be decided by you upon the evidence considered in the light of all these instructions as to the law given you by the Court.

That is why I admonish counsel. I don't do it because I am mad at anybody. You determine lawsuits not on what may have happened somewhere else or some experience you may have had on some other incident, but from the evidence that you hear in the courtroom and you are entitled to take all of the evidence—made up of the testimony of the witnesses and exhibits that are in evidence, and whatever you see in the courtroom—in arriving at a proper verdict.

You are not permitted to go all over any and all possibilities and draw upon any sort of experience and apply it to what you have here for your consideration, because you have heard this case as jurors, and what may have happened somewhere else isn't in the same form as you got it in here in the lawsuit.

You are the exclusive judges of the credibility of the witnesses and the weight to which their testimony is entitled. In this regard you may take into consideration the interests the witness has in the suit, if any; the bias or prejudice of the witness, if any was shown, and by credibility, I mean believability of a person, either a witness or the party himself.

The mere fact that the accident happened does not, in and of itself indicate negligence or that anyone was negligent or that the plaintiff is entitled to recover.

Before you can find a verdict in favor of the plaintiff in this case, you must find that he has sustained the burden of proving each and every one of the following elements of his case by a fair preponderance of the evidence:

First, that the defendant was guilty of negligence.

And the defendant we are talking about in this case is the Chesapeake & Ohio Railroad.

Second, that such negligence was a proximate cause of the accident.

Third, that the plaintiff has sustained damages.

If the plaintiff fails to prove any one of the foregoing elements by the greater weight of the evidence, then he cannot recover in this case.

The phrase "a preponderance of the evidence" means the greater weight of the evidence.

The greater weight of the evidence is not dependent alone upon the number of witnesses testifying upon the one side or other of a given proposition, but in determining where lies the greater weight of the evidence you may, in addition to the number of witnesses, also take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the probability or improbability of the truth of their several statements; and from all of these circumstances together with all the other facts and circumstances proved upon the trial, you may determine upon which side is the greater weight of the evidence.

Negligence is the failure to do something which an ordinarily careful person would do, or the doing of something which an ordinarily careful person would not do under the same or similar circumstances. It is the failure to use ordinary or reasonable care under the circumstances.

The circumstances we are talking about are the circumstances that apply to the matter we have for consideration, the accident.

Ordinary care is not an absolute term but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be considered in the light of all the surrounding circumstances as shown by the evidence.

The words "Proximate cause", whenever used in these instructions, mean that cause which, in natural, unbroken and continuous sequence, produced the result complained of. It need not be the sole cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause, in whole or in part, acting at the same time which, in

combination with it, caused the injury and damages herein complained of.

Contributory negligence is the failure by plaintiff to use reasonable care for his own safety.

It was the duty of the plaintiff to use reasonable care to avoid injury to himself. If you find from the evidence and under the instructions of the Court that the plaintiff failed to use such care just before and at the time of the occurrence in question—that is the accident—and if you also find from such failure, if any, that—

I will read that again. If you also find that such failure, if any, proximately contributed to cause such occurrence, then plaintiff cannot recover from defendant whether or not defendant was guilty of negligence.

A fact may be proved either by circumstantial evidence or direct evidence or both. Circumstantial evidence is such evidence as tends to prove a fact indirectly and gives rise to a reasonable inference in the minds of the jury of the existence of the fact sought to be proved.

Direct evidence is such evidence that tends to prove a fact directly.

I will give you an illustration of what is meant by those two principles:

If there is a vacant building on a lot with one door and no other means of getting in or out and you see two men walk through that door into that vacant building and you go over and go in and see one man take a pistol and shoot the other, then you have direct knowledge of the fact that the man with the pistol is the one that committed the crime.

If you see the same two men, under the same circumstances, walk in the door in the same building, and while you are standing outside and can't see in the building you hear a gun shot, a rifle shot, and you see one man walking out with a gun in his hand and you go over and see the other man dead on the floor, you have circumstantial evidence.

Under the first set of circumstances you have direct knowledge because you saw what happened. Under the second set of circumstances you have circumstantial evidence, the circumstances of what you saw outside of the building, and due to the fact that the one man killed the other. So one type of evidence is as good as the other. One is circumstantial. The fact that the man heard the rifle shot and went in and found the man dead; the other he saw it happen.

If you find that any witnesses testified contrary to the physical facts proved in evidence then you are instructed it is within your province, if you so desire, to disregard such testimony conflicts with proved physical facts or laws.

During the course of the trial there has been introduced the testimony of a Medical Doctor who qualifies as an expert—that was Dr. Newman. I instruct you that an expert is one who is presumed to have special qualifications in his profession or vocation by reason of education, training and experience. You are to weigh the testimony of an expert witness in the same manner as you do the testimony of any other witness, taking into consideration the probabilities of the truth of which he speaks, together with the facts from which he draws his inferences.

If, after reviewing all of the evidence, you feel that the evidence is equally balanced and that neither side has con-

vinced you one way or the other on the matter, then you must decide against the plaintiff because he has failed to bear the burden of proof, which is his obligation in this lawsuit.

In your consideration of the testimony as adduced at this trial you are permitted to draw reasonable inferences from the testimony you believe. If counsel have drawn any inferences, they are not controlling upon you. You may accept them or draw your own inferences from the facts as you find them, but inferences which you do draw must be reasonable.

If you find from the greater weight of the evidence and under the instructions of the Court that the plaintiff is entitled to recover, then you may consider the question damages, if any. If you find from the evidence and under the instructions of the Court that the plaintiff is not entitled to recover, then you must not consider the question of damages.

The fact that the Court gives any instructions on the question of damages or that counsel has discussed such subject is not to be taken by you as any intimation by the Court or any admission by counsel for the defendant that the defendant is liable.

You are instructed that if you should find under my instruction the plaintiff is entitled to damages for personal injuries incurred by him in endeavoring to be cured

Wait a minute, I will go over it again: You are instructed that if you should find under my instructions that plaintiff is entitled to damages for personal injuries, he would be entitled to recover expenses incurred by him in endeavoring to be cured of his injuries, including medical expenses, hospital expenses, medications and any other

items he has proved incident thereto. So, if there is any proof of those particular types of expenses, they are generally called hospital or medical expenses, that is in the testimony, then you can consider that, provided that you feel that the plaintiff is entitled to recover.

It is up to you, as jurors, to determine the amount of damages, if any, from the facts and circumstances proved by the evidence. In doing so, you may take into consideration the nature and extent of the plaintiff's physical injuries which were the proximate result of the occurrence in question, and the suffering in body and mind resulting from such physical injuries; such future suffering and loss of health, if any, as he may sustain by reason of such injuries. You may also consider expenses that he has incurred to date and will incur for medical treatment and medications in the future and loss of earnings to date as well as loss of wages, or earnings in the future.

If you find that the plaintiff has suffered injuries that you find to be permanent, it is for you to determine the extent of such injuries. If you decide that they are permanent, it is for you to determine how long the plaintiff will live.

Upon that subject you have heard the testimony as to his age and condition of his health before these injuries and general state of his health now. If you should determine by a preponderance of the evidence that the plaintiff, Staphan L. Koserkoff, before this accident was a healthy person and as a result of this accident he sustained permanent injuries and that he is going to suffer pain, anguish and discomfort as a direct result of the accident for the balance of his natural life, then it would be for you to determine how long he will still live. Mortality tables were introduced which indicate that the plaintiff has a life expectancy of

8.69 years from the date of his injury, which would be October the 3rd, 1962, or 6.21 years from the present time. These tables are not binding upon you but are evidence which you may rely upon in determining the reasonably-to-be-expected life expectancy of a person of Mr. Koserkoff's age.

I charge you that you are not prevented from assessing reasonable damages for an injury sustained because of the fact that they may be uncertain in respect to amount. You are not expected to ascertain the amount of damages with the exactness and precision; you as jurors must determine in your own mind the amount of damages to which you think the plaintiff is entitled, provided, of course, that he is entitled to recover. Damages may not be determined by mere speculation or guess. They are to be determined by you from the facts and circumstances proved by the evidence which has been submitted to you during this trial.

I instruct you that you are not to allow damages by way of penalty or punishment. Damages, in the eyes of the law, is compensation for the losses actually sustained which are the direct result of the occurrence out of which this litigation arose; it is payment of a sum of money, in amount as nearly and as fairly as money may compensate the plaintiff for the damages suffered by reason of the injuries sustained.

Generally speaking, you should use your good sense here, ladies and gentlemen of the jury, just as you would in acting upon the most vital and important matters pertaining to your own affairs. Resolve the facts of this case according to calm, deliberate and cautious judgment in the light of your own knowledge of the natural tendencies and propensities of human beings.

There is testimony in this case that an agreement was signed by the plaintiff and his attorney and American Steamship Company in the sum of $9,428.00. I charge you that the jury has a right to take into consideration under these circumstances, the amount of money that has been received by the plaintiff in this case, and to deduct such money from any award that the jury might give to the plaintiff, provided, however, that you first determine that plaintiff is entitled to recover under these instructions as given you by the Court.

If you reach the question of damages, then you are to keep in mind that the Chesapeake & Ohio Railway Company is to be given credit for the sum of $9,428.00 which has already been paid by the American Steamship Company, in any verdict which you may render against the Chesapeake & Ohio Railway Company.

If you find that the plaintiff has been fully compensated by the American Steamship Company for his injuries sustained, then your verdict against the Chesapeake & Ohio Railway Company would be no cause of action.

I charge you that a corporation, which is the C & O's status, is liable for the acts of its agents or employees while acting in the course of their employment.

This case should be considered and decided by you as an action between two persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respector of persons; all persons, including corporations, stand equally before the law and are to be dealt with as equals in a court of justice.

In reaching your verdict you should consider solely the facts and laws presented you in this case. You should keep

your mind free of bias, prejudices or sympathy and should not be swayed either one way or the other by such considerations nor resort to surmise, conjecture or speculation. You cannot guess a verdict.

In determining the issue presented to you, it is your duty to consider all the evidence in the case bearing upon such issues, regardless of which party introduced the evidence, and from a fair preponderance of all of the evidence determine your verdict.

You may return one of two verdicts with regard to the plaintiff. If you find for the plaintiff, Mr. Koserkoff, then your verdict will be, "We find for the plaintiff, Mr. Koserkoff," and you should state in your verdict the amount you find for him.

If you find for the defendant, your verdict should be "no cause of action."

You retire to your jury room now, but do not commence your deliberations until I tell you.

It is time to go to lunch, so if I have a consultation with counsel I will excuse you for lunch and after lunch you will come back to the jury room and commence your deliberations.

All right, retire to your jury room.

APPENDIX J

PLAINTIFF'S OBJECTIONS TO THE DISTRICT COURT'S CHARGE TO THE JURY

The Court: Does plaintiff have any exceptions?

Mr. Finn: Your Honor, I do have, for the record, some objections. Of course, I continue my objections to withholding of the Court on Maritime.

The Court: This is different from that. I am talking about the charge to the jury.

Mr. Finn: Immediately after the closing of my rebuttal where I concluded by asking the jury to do justice for my client and give him the personal attention that he had not received from me, and the Court—I don't recall the exact words—stated before it began to read the instructions, it singled out and emphasized the direction to the jury that, something to the effect that "not to do justice for any one person, but to follow, do justice to their oath." I think my objection is to single out and emphasize immediately thereafter, putting undue attention on that remark, which I think your Honor, I object to for the record.

The Court: First, you have misquoted. I said there should be equal justice.

Secondly, I thought the argument was completely out of order. What you may or may not do in representing your client is not a question of evidence and has no place in the argument to the jury. It was completely out of order. I wasn't going to let the jury feel that somehow or other you let your client down and because you let your client down they should do what you were supposed to do and give him a verdict.

Mr. Finn: I think your Honor misinterpreted what I have in mind.

The Court: I had no trouble interpreting: You weren't talking to yourself, you were talking to a jury.

Mr. Finn: I'd like the record also to show that the defendant made no objection.

The Court: I regulate the conduct of the trial of a case, not the defendant or the counsel, and it is incumbent on the judge, any judge that is presiding over the trial, to keep improper argument away from the jury. I have indicated it was improper argument.

Do you have any further objections or exceptions?

Mr. Finn: Nothing further, your Honor.

APPENDIX K

MOTION BY DEFENDANT FOR JUDGMENT NOTWITHSTANDING VERDICT

UNITED STATES DISTRICT COURT

Eastern District of Michigan
Southern Division

Civil No. 25192

Staphan L. Koserkoff,
Plaintiff,
vs.
The Chesapeake and Ohio Railway Company,
Defendant.

Now comes The Chesapeake and Ohio Railway Company, defendant herein, by Walter A. Kleinert and Robert A. Straub, its attorneys, and moves the Court to set aside the verdict of the jury heretofore given on March 14, 1969 and any judgment entered thereon in the above entitled cause and to enter judgment for the defendant of no cause of action in accordance with defendant's motion for directed verdict heretofore made at the close of all the evidence in the case notwithstanding the verdict given, for the following reasons:

1. Plaintiff has failed to sustain the burden of proving the negligence on the part of the defendant as alleged in his amended complaint.

2. Plaintiff has failed to sustain the burden of proving freedom from contributory negligence on his part.

3. The proofs and evidence in this case conclusively establish the defendant free from any negligence on its part as a matter of law.

4. The proofs and evidence in this case conclusively establish the plaintiff guilty of contributory negligence as a matter of law, which said contributory negligence bars any recovery on plaintiff's part.

5. Plaintiff has failed to sustain the burden of proving that the defendant owned and provided the ladder used by plaintiff in his descent from the S. S. J. F. Schoelkopf, Jr.

6. Plaintiff has failed to sustain the burden of proving that the defendant failed to properly illuminate the area leading from the S. S. J. F. Schoelkopf, Jr. at or about 7:30 A.M. on October 3, 1962, at The Chesapeake and Ohio Railway Company dock at Toledo, Ohio.

7. Plaintiff has failed to sustain the burden of proving that The Chesapeake and Ohio Railway Company, through its employees, acting within the scope of their employment, caused or directed plaintiff to descend the ladder from the S. S. J. F. Schoelkopf, Jr. in the manner as alleged in his amended complaint.

8. Plaintiff has failed to sustain the burden of proving that The Chesapeake and Ohio Railway Company, through its employees, acting within the scope of their employment, caused or directed plaintiff to jump from the loading crane onto the dock, thereby causing the injuries complained of in the amended complaint.

9. Plaintiff has failed to sustain the burden of proving that the defendant was under a duty on its part to warn said plaintiff of the operation of the loading crane in the area of the aforesaid dock.

10. The proofs and evidence in this case conclusively establish that the loading crane was in a stationary posi-

tion at the time said plaintiff made his descent on the ladder of said ship, during the descent, while climbing onto the crane and at the time of plaintiff's jump from the crane to the dock.

11. The proofs and evidence in this case conclusively establish that the dangers complained of by plaintiff were clearly visible and obvious to said plaintiff.

12. The proofs and evidence in this case conclusively establish that plaintiff voluntarily placed himself in, or remained in, a position which he knew, or with reasonable care should have known, was dangerous, without any direction or action on the part of defendant.

13. The plaintiff has failed to allege in his amended complaint or prove any wilful or wanton misconduct on the part of defendant.

This motion is based upon the files and records in this Court and cause.

It is necessary to bring and file the within motion for the reason that concurrence of plaintiff's counsel in the relief sought was requested on April 2, 1969 and such concurrence was on that date denied.

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Dated: April 4, 1969.

Acknowledgment of Service

Service upon us of a true copy of the foregoing notice and motion and brief is hereby acknowledged.

Victor G. Hanson
James F. Finn
Attorneys for Plaintiff
By /s/ Rosemarie Hanson

Dated: April 4, 1969.

SUPREME COURT, U. S.

FILED

IN THE

SUPREME COURT OF THE UNITED STATES

No. 991

OCTOBER TERM, 1970

STAPHAN L. KOSHKOFF,
Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY CO.,
Respondent.

SEAMAN'S APPEAL, RULE 54, 28 U.S.C. 1916

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases

Burrage v. *Flota Mercante Grancolombiana*, 431 F.2d 1229 (5th Cir. 1970) 3

Chagois v. *Lykes Bros. S. S. Co.*, 432 F.2d 388 (5th Cir. 1970) 3

Hagans v. *Ellerman & Bucknal S. S. Co.*, 318 F.2d 563 (3rd Cir. 1963) 3

Law v. *Victory Carriers, Inc.*, 432 F.2d 376 (5th Cir. 1970) 3

McKnight v. *N. M. Paterson & Sons, Ltd.*, 286 F.2d 250 (6th Cir. 1960) 2

Rules and Statutes

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PETITIONER'S REPLY BRIEF

We do not understand Respondent's argument that Petitioner (Plaintiff below) withdrew his claim under

the maritime law in the face of the indications of the Trial Judge at all phases of the proceedings that he did not agree with the Plaintiff's position, faced as he was with his own Circuit's ruling in *McKnight* v. *N. M. Paterson & Sons, Ltd.*, 286 F.2d 250 (6th Cir. 1960). Just as consistently as the Plaintiff raised the issue of maritime law, the railroad and the Trial Judge just as persistently refused to accept the premise. Respondent's recitations from the record make this just as clear as it was to the apprehensive attorney representing the Plaintiff in the District Court.

In this context, the Respondent's argument that Petitioner did not later object to the jury charges based on common law negligence is specious at best. The Trial Judge had already ruled that he was applying the common law, and was rejecting maritime law. On this status of the record, Plaintiff was not required to comply with Rule 51, Fed. R. Civ. Proc., requiring objections to charges as a predicate to appeal since he actually found no error with the charges as given, considering the previous rulings of the Trial Judge.

However, be that as it may, we do not understand the Trial Judge's refusal to apply maritime law, or even withdrawal of a claim under the maritime law by Plaintiff as a proper basis for changing the law. Either the Judge was correct in his comments that he did not agree with Plaintiff's position, or he wasn't, and this Court is the only court which can now resolve that conflict.

Nor do we understand, and fail to grasp the significance of the Respondent's devotion of the major portion of its brief to the Plaintiff's release of the shipowner-employer under the Jones Act, 46 U.S.C.A. 688, and the

claim for maintenance and cure. In coping with long delays in trial calendars, trial counsel representing injured plaintiffs must make hard decisions for their clients' welfare. In this case, a partial settlement several years before trial, on behalf of an elderly, now idle client seemed to be in his best interests.

It is respectfully submitted that either Staphan L. Koserkoff had a cause of action against the railroad under the maritime law, or even the common law, or he didn't, and the jury thought he did. The partial release should not determine the law. Either the jury was correct, or it wasn't. The release has nothing to do with it.

Supplementing the Petition, we note to the Court that several of the cases cited therein were then unreported, and are now reported:

Burrage v. *Flota Mercante Grancolombiana*, cited in the Petition at Page 15, is now reported at 431 F.2d 1229 (5th Cir. 1970).

Law v. *Victory Carriers, Inc.*, cited in the Petition at Pages 8, 10, 11, 12, is now reported at 432 F.2d 376 (5th Cir. 1970).

Chagois v. *Lykes Bros. S. S. Co.*, 432 F.2d 388 (5th Cir. 1970), supports the arguments in *Law* v. *Victory Carriers*. Also supporting these arguments is *Hagans* v. *Ellerman & Bucknal S. S. Co.*, 318 F.2d 563 (3rd Cir. 1963).

In the *Chagois* case, 432 F.2d, at 394, in footnote #3, the Fifth Circuit specifically notes its conflict with the Second and Sixth Circuits on the issue of whether or not a shoreside crane, discharging cargo from a vessel, is maritime equipment.

For the reasons given, it is respectfully submitted that this Court review the conflicts between circuits and grant the writ of certiorari to the Sixth Circuit.

Respectfully submitted,

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By: .....
ARTHUR ROTH

I hereby certify that copies hereof were mailed to Walter A. Kleinert, 2964 Penobscot Building, Detroit, Michigan, and Robert A. Straub, Room 407, No. 1 Northland Plaza, 20755 Greenfield Road, Southfield, Michigan, this 26th day of January, 1971.

.....
ARTHUR ROTH

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
[illegible] 1971
E. ROBERT SEAVER, CLERK

IN THE

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PETITIONER'S PETITION FOR REHEARING

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SEAMAN'S APPEAL, RULE 54, 28 U.S.C. 1916

PETITIONER'S PETITION FOR REHEARING

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was denied herein on March 1, 1971.

Petitioner's reply brief filed herein cited conflict between the Sixth Circuit and the following Fifth Circuit cases:

Law v. *Victory Carriers, Inc.*, 432 F.2d 376 (5th Cir. 1970).

Chagois v. *Lykes Bros. S.S. Co.*, 432 F.2d 388 (5th Cir. 1970).

Petitioner also noted specifically the Fifth Circuit contention of its conflict with the Second and Sixth Circuits in a footnote in *Chagoya*.

It now appears that this Court has granted a Petition for Writ of Certiorari in the *Lauw case*, sub nom., *Victory Carriers, Inc. v. Lauw*, No. 1092, October Term, 1970.

WHEREFORE, Petitioner, STAPHAN L. KOSER KOFF prays that re-hearing be granted herein, that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted and that this case be heard together with *Victory Carriers, Inc. v. Lauw*, No. 1092, October Term, 1970.

Respectfully submitted,

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By: .....
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I hereby certify that copies hereof were mailed to Walter A. Kleinert, 2964 Penobscot Building, Detroit, Michigan, and Robert A. Straub, Room 407, No. 1 Northland Plaza, 20755 Greenfield Road, Southfield, Michigan, this 30th day of March, 1971.

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ARTHUR ROTH